

OVERSIGHT OF THE DEPARTMENT OF DEFENSE  
OFFICE OF INSPECTOR GENERAL'S MILITARY  
WHISTLEBLOWER REPRISAL INVESTIGATIONS

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HEARING

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY

OF THE

COMMITTEE ON OVERSIGHT  
AND GOVERNMENT REFORM  
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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## ADDITIONAL INFORMATION

1. An Article Written by William H. McRaven on April 24, 2016, a Special to the Tampa Tribune, Titled, "William McRaven: A Warrior's Career Sacrificed for Politics"- Submitted by National Security Subcommittee Chairman Ron DeSantis (FL). It can be found online here: <http://www.tbo.com/list/news-opinion-commentary/william-mcraven-a-warriors-career-sacrificed-for-politics-20160424/>
2. A New York Times Op-Ed by Mark Hertsgaard Published on May 26, 2016, titled, "Whistle-Blower, Beware"- Submitted by Representative John J. Duncan, Jr. (TN). It can be found online here: <http://www.nytimes.com/2016/05/26/opinion/whistle-blower-beware.html>



## OVERSIGHT OF THE DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL'S MILITARY WHISTLEBLOWER REPRISAL INVESTIGATIONS

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Wednesday, September 7, 2016

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON NATIONAL SECURITY,  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,  
*Washington, D.C.*

The subcommittee met, pursuant to call, at 2:04 p.m., in Room 2154, Rayburn House Office Building, Hon. Ron DeSantis [chairman of the subcommittee] presiding.

Present: Representatives DeSantis, Mica, Duncan, Hice, Russell, Hurd, Lynch, and Lawrence.

Mr. DESANTIS. The Subcommittee on National Security will come to order. Without objection, the chair is authorized to declare a recess at any time.

Inspectors general play an important role in ensuring accountability in executive branch agencies, and whistleblowers are a key tool in combatting waste, fraud, and abuse within government. But IGs have a responsibility to conduct investigations in a fair, timely, and accountable manner, and whistleblower complaints cannot be used to shield the civilian or military member from accountability for substandard performance.

The recent case of Rear Admiral Brian Losey, who was forced to end his stellar career as a Navy SEAL after a lengthy series of IG investigations and political maneuvering, raises significant questions regarding the IG process, the erosion of military command authority, and the treatment of an officer who gave so much for our country.

Losey's 30-year career sent him all around the globe to defend our Nation, had habitual deployments as a junior officer, going to Afghanistan shortly after the 9/11 attacks, serving multiple deployments in Iraq, commanding the famed SEAL Team 6. His final duty assignment was to serve as the commander of WARCUM, which oversees all Navy SEALs.

Retired admiral and Navy SEAL William McRaven has written that Losey is, "Without a doubt, one of the finest officers of whom I have ever served. Over the past 15 years, no officer I know in the SEAL teams has given more to this country than Brian Losey."

There are very few Americans who have given as much to our country as Brian Losey. Yet Losey's career was cut short following

a flurry of lengthy investigations conducted by the DOD IG and intervention by a handful of U.S. Senators.

In 2011, Losey assumed command at the Special Operations Command Africa, SOCAFRICA, which was a relatively new command that was still trying to become capable of dealing with the growing threats emanating from the African continent. The command was based in Stuttgart, Germany, and the command featured a small number of staffers who had grown accustomed to the relaxed European lifestyle.

Upon assuming command, Losey faced a situation in which the command was not performing at the level required. He saw a need to improve the command and change the prevailing culture. It would not necessarily be easy to do so, but it was necessary to do so.

Meanwhile, an anonymous whistleblower filed a complaint against Losey alleging that he illicitly flew his daughter to Germany at taxpayer expense. The complaint was bogus in every respect. Not only did Losey not fly his daughter to Germany on the taxpayer's dime, he was actually entitled to do so, if he so chose, under the existing travel regulations. Nevertheless, the existence of this complaint, combined with Losey's befuddlement regarding the complaint, cast a shadow over Losey's attempts to take action to reform SOCAFRICA as he was accused of retaliating against whistleblowers who filed additional complaints as Losey undertook his actions.

The Navy conducted an IG investigation and found that Losey's actions were justified on the merits and did not constitute unlawful reprisals. He subsequently earned a promotion of Rear Admiral Upper Half, 2-Star billet, and was assigned to command WARCOM. A review of the command climate commissioned by the commander of AFRICOM found that Losey was, "the right man for the job at this time." and cited, "pockets of resistance within the command to the new course charted by Losey."

The DOD IG conducted its own investigation, included that some of Losey's actions were reprisals for the whistleblower complaint. Although the IG investigation was required by law to be concluded in 180 days, the Losey investigation, multiple investigations dragged on for years, delaying his ascension to 2-star admiral for 2 years.

The Navy reviewed the findings of the DOD IG and determined that the personnel actions initiated by Losey were not reprisals but a legitimate exercise of command authority. A group of U.S. Senators, though, rejected the Navy's findings and sought to engineer Losey's ouster. Using legislative leverage, they effectively forced the hand of the Secretary of Navy who revoked Losey's promotion, thereby shortcircuiting a storied career.

This is a tragic outcome that has failed to do justice to one of America's top warriors, and the whole ordeal raises questions about how the whistleblower process functions. For one thing, the main whistleblower complaints that Losey violated travel regulations by flying his daughter to Europe and that Losey created a, "toxic command climate" were both factually false. He paid for his daughter's trip and actually was entitled to have the trip funded by the Navy. And the AFRICOM report compiled by Lieutenant General Ray

Palumbo found that SOC AFRICOM was, “trending along the path of improvement under Real Admiral Losey’s leadership, vision, and direction.” Yet the procedural and investigator aftermath of these baseless complaints culminated in Losey losing his career.

Second, the filing of false reports can undermine command authority. At a minimum, there is a dispute between the Navy and the DOD IG about Losey’s—whether Losey’s actions were legitimate actions undertaken by a military commander. A false IG complaint under these circumstances can be used as a weapon to make core command decisions a more risky proposition.

Third, the years’ long investigative process left Admiral Losey in a perpetual state of uncertainty and was contrary to the 180-day mandate. Doesn’t an officer who has given so much for our country deserve to have matters such as these resolved within the time-frame enumerated by the law? How is the IG held accountable for consistently failing to abide by the 180-day requirement?

Fourth, much was made over the course of the investigations regarding the leadership style of Brian Losey. He certainly ruffled feathers at SOCAFRICA, but do we want commanders who demand too much or too little? The mark of a good commander is whether the mission gets successfully executed, not whether everyone’s feelings are taken into account.

Today, we will hear from several witnesses who have experience in IG investigations, including the principal deputy IG for the Department of Defense, Mr. Fine. We will also hear from my colleague, Ryan Zinke from Montana. Ryan is a retired Navy SEAL captain who commanded SEAL Team 6 and who has a keen understanding of the challenges facing our special operation force commanders.

I thank you all for attending. And with that, I will now recognize Ranking Member Lynch for his opening statement.

Mr. LYNCH. Thank you, Mr. Chairman. I would like to thank you for holding this hearing to examine the management of the military whistleblower reprisal investigations by the Department of Defense Inspector General, and I would also like to welcome our colleague, Mr. Zinke of Montana, and other distinguished witnesses for helping this committee with its work.

I would caution that the full case of Mr. Losey was a—an extensive review with about 100 witnesses and I think 300,000—30,000 pages. So a lot of trees have died, and we have very little of the information before this committee. So I will just acknowledge and appreciate Rear Admiral Losey’s performance in Bosnia, in Afghanistan, and Iraq on behalf of this country, his courageous service. I cannot pass judgment on the 100 witnesses and 30,000 pages of documentations that were put together in this investigation.

And I do have enormous respect for those Senators, that group of Senators, Democrats and Republicans, Senator Ron Wyden of Oregon, Senator John McCain of Arizona, Senator Jack Reed from Rhode Island, who reviewed this and agreed to substantiate not the—not the allegations against, you know, improper use of resources regarding, you know, flights for family. That wasn’t the case here.

The case at heart was whether whistleblowers who came forward with information were retaliated as a result of them coming for-

ward. That is the core of this. And we don't have enough information before this committee to pass judgment on that, so I—I appreciate that with—look, I want to do something I don't normally do, which is I want to thank the Members of the Senate for their good work. I don't do—that is probably the first time I have ever done that, but—probably won't happen again, but this is a tough case. And I will just, you know, let the facts take us where they will in that regard.

We do have really an abominable case, though, with the Department of Defense Office of the Inspector General. We are in total agreement on that. We have got cases where there appears to be deliberate mishandling of documentation. You are right, Mr. Chairman, they have failed miserably in meeting the 180-day statutory requirement for informing servicemembers of their rights and of the status of their case. Instead of 180 days, the average day over there for review is 526 days, and in that case, you know, justice delayed is justice denied for a lot of these soldiers who come forward and report misconduct and engage in whistleblowing.

So there is a lot here. There are—there is the case of personnel at the DOD Inspector General's office backfilling evidence in files after the case is closed, which, you know, sounds like some of the things that we have prosecuted people for and people are doing jail time for. So there is a lot to look at here.

Again, I appreciate our colleague, Mr. Zinke of Montana coming before and testifying before this committee. We really appreciate his good work. He's a great Member of Congress and has done yeoman's work on this case, and I would like to hear him and the other witnesses on this matter.

And with that, I will yield back the balance of my time.

Mr. DESANTIS. I thank the gentleman from Massachusetts.

Without objection, the chair would like to introduce into the record an op-ed published by William McRaven April 24th, 2016, "A Warrior's Career Sacrificed for Politics." Without objection, so ordered.

Mr. DESANTIS. I will hold the record open for 5 legislative days for any members who would like to submit a written statement.

We will now recognize the distinguished witness on our first panel. I am pleased to welcome representative at large for the State of Montana, Congressman Ryan Zinke. We thank you for your participation today. Your entire written statement will be made part of the record, and we welcome any oral remarks that you may have.

## WITNESS STATEMENTS

### TESTIMONY OF HON. RYAN ZINKE

Mr. ZINKE. Well, thank you, Mr. Chairman. Thank you, Mr. Chairman, and for the record, I was a commander at SEAL Team 6 and retired as a commander.

Good afternoon. Ranking Member Mr. Lynch, great to see you, and distinguished members of the Subcommittee on National Security. I would like to thank you for the opportunity to testify before you today on the important issue of the Department of Defense Office of the Inspector General's military whistleblower reprisal pro-



gram. In my testimony today, I am going to focus my attention on the DOD IG investigations of my friend and colleague Rear Admiral Brian Losey during his time as commander of Special Operations Command Africa.

Beginning with an anonymous complaint in 2011, the DOD IG held five separate investigations into accusations of reprisal against Rear Admiral Losey, which have taken more than 4 years to complete.

One of these investigations involved an alleged reprisal against a suspected whistleblower under his command. During this investigation, the office of DOD IG seemed to display a blatant mishandling and misrepresentation of evidence, both in their preliminary and final report. Following numerous witnessed accounts of misconduct by the complainant, by Rear Admiral Losey, and others, the security officer for Special Operations Command Africa ordered a command directed investigation, a CDI, into the complainant's actions.

During the preliminary report, the DOD IG blatantly misrepresented the CDI by stating that the investigative officers completed the CDI and determined that all 10 allegations were not substantiated as alleged, a statement that was eventually proven to be completely false.

The CDI found that three allegations were substantiated and two of the allegations were partially substantiated. Additionally, the CDI recommended the complainant should be issued a negative referral on an officer performance report and administrative discipline.

Acting on those recommendations, Rear Admiral Losey relieved the complainant of his position and reassigned him to a different position in a different geographical combatant command that he believed would be commensurate with his rank. Although the DOD IG amended their language in the final report, the DOD IG still chose to dismiss the complainant of any wrongdoing, dismissed the findings and recommendations of CDI, and claim that the administrative actions taken by Rear Admiral Losey constituted an act of reprisal. In reality, he was simply holding a subordinate accountable for his actions following the guidance of the report. That is clear.

In the same investigation, DOD IG claims, during this investigation, Rear Admiral Losey specifically accused complainant of signing three letters of retention for Air Force officers using an autopen. However, the supposed accusation by Rear Admiral Losey is not found in any of the DOD IG interview transcripts. According to DOD IG, this accusation arose from an unrecorded conversation the DOD IG investigator had with Rear Admiral Losey outside of the official interview. The DOD IG should not be using unrecorded conversations as evidence that cannot be collaborated or confirmed. This is an unprecedented action and has no legal merit and is completely inappropriate behavior by the DOD IG.

Over the course of five investigations of acts of reprisal by Rear Admiral Losey, the DOD IG was in blatant violation of military law in Uniform Code of Military Justice. Title 10 U.S. section code 1034 clearly states the DOD IG is required to complete their investigations in 180 days or less. Unfortunately, four out of five investiga-

tions completed by the DOD IG were a complete disregard for the 180 deadline.

Additionally, per Title 10, U.S. Code, section 624, an active investigation cannot hold statutory promotions up for more than 18 months. After being confirmed by the Senate for promotion, Rear Admiral Losey was promoted the rank of Rear Admiral Upper Half on April 1, 2013.

On March 31, 2015, the DOD IG informed the Secretary of Navy that Rear Admiral Losey was no longer subject to the fifth and final investigation, one day shy of a promotion being held up by the DOD for 24 consecutive months, far longer than the 18-month mandate.

These blatant acts of violations of law by the DOD IG not only cheapen the findings of the reports but erodes the trust the public and the military have in their government institutions. If the DOD IG lacks the ability to simply follow deadlines in investigations or use evidence that cannot be collaborated, then it raises the question as to what other laws and guidelines they simply choose to disregard during the course of their investigations.

In conclusion, I would like to call upon the memo of that of former Secretary Chuck Hagel penned in saying: It's central to the military justice that those involved in the process base their decisions on on their independent judgment. Servicemembers and the American people must be confident the military justice system is inherently fair and adheres to the fundamental principles and due process of law.

With that, thank you for the opportunity to testify, and I look forward to your questions.

[Prepared statement of Mr. Zinke follows:]

Ryan Zinke  
Member of Congress

September 7, 2016

House Committee on Oversight  
and Government Reform

*Subcommittee on National Security*

Good Afternoon, Chairman DeSantis, Ranking Member Lynch, and distinguished members of the Subcommittee on National Security, I would like to thank you for the opportunity to testify before you today on the important issue of the Department of Defense Office of Inspector General's (DoD IG) Military Whistleblower Reprisal Investigations.

In my testimony today I would like to focus my attention on the DoD IG investigations of Rear Admiral (RDML) Brian Losey during his time as Commander of Special Operations Command Africa. Beginning with an anonymous complaint in 2011, the DoD IG held five separate investigations into accusations of reprisal against RDML Losey, which has taken more than four years to complete.

One of these investigations involved the alleged reprisal against a suspected whistleblower under his command. During this investigation, the office of DoD IG seemed to display a blatant mishandling and misrepresentation of evidence in both their preliminary and final report.

Following numerous witnessed accounts of misconduct by the Complainant from RDML Losey and others, the Security Officer for Special Operations Command Africa ordered a Command Directed Investigation (CDI) into the Complainant's actions. During the preliminary report, the DoD IG blatantly misrepresented the CDI by stating that "... the IO [Investigating Officer] completed the CDI and determined that all 10 allegations were not substantiated as alleged;" A statement that was eventually proven to be completely false. The CDI found that three allegations were substantiated, and 2 of the allegations were partially substantiated. Additionally, the CDI recommended that the Complainant should be issued a negative referral on an Officer Performance Report and administrative discipline. Acting on the recommendations, RDML Losey relieved the Complainant of his position and reassigned him to a different position in a different geographical combatant command that he believed to be commensurate of his rank.

Although the DoD IG amended their language in the final report, the DoD IG still chose to dismiss the Complainant of any wrongdoing, dismissed the findings and recommendations of the CDI and claimed that the administrative actions taken by RDML Losey constituted as an act of reprisal. In reality, he was simply holding a subordinate accountable for his own actions and following the guidance of the report.

In the same investigation, DoD IG claims: "... during this investigation, RDML Losey specifically accused Complainant of signing three letters of retention for Air Force officers using the autopen."

However, this supposed accusation by RDML Losey is not found in any of his DoD IG interview transcripts. According to the DoD IG, this accusation arose from an unrecorded conversation the DoD IG investigator had with RDML Losey outside of the official interview. The DoD IG should not be using unrecorded conversations as evidence that cannot be corroborated or confirmed. This unprecedented action has no legal merit and is completely inappropriate behavior by the DoD IG.

Over the course of the five investigations of acts of reprisal by RDML Losey, the DoD IG was in blatant violation of military law and United States code. Title 10 U.S. Code Section 1034 clearly

states that the DoD IG is required to complete their investigations in 180 days or less. Unfortunately four out of the five investigations completed by the DoD IG were in complete disregard for this 180 day deadline. Additionally, per Title 10 U.S. Code Section 624, an active investigation cannot hold statutory promotions for more than 18 months. After being confirmed by the Senate for promotion, RDML Losey was to be promoted to the rank of Rear Admiral (Upper Half) on April 1, 2013. On March 31, 2015, the DoD IG informed the Secretary of the Navy that RDML Losey was no longer a subject in the 5<sup>th</sup> and final investigation; one day shy of his promotion being held up by the DoD IG for 24 consecutive months, far longer than the 18 month mandate.

These blatant violations of the law by the DoD IG not only cheapen the findings of their reports, but erodes the trust that the public and the military have in their government institutions. If the DoD IG lacks the ability to simply follow deadlines in investigations or use evidence that cannot be corroborated, then it raises questions as to what other laws or guidelines they simply choose to disregard while conducting their investigations.

In conclusion I would like to call the attention to a memo that former Secretary of Defense Chuck Hagel penned called Integrity of the Military Justice Process. In it he stated "Central to military justice that those involved in the process base their decisions on their independent judgment... Service members and the American people must be confident that the military justice system is inherently fair and adheres to the fundamental principle of due process of law." Regardless of the outcome and conclusions of the DoD IG investigations in the case of RDML Losey, I believe the process and the manner in which those investigations were conducted failed to uphold to the standards that the American public and the service members expect.

RDML Losey is a personal friend and fellow soldier that I had the privilege of serving with in the US Navy SEALs. He is an honorable man, whose service, sacrifice and even promotion has been besmirched and delayed by an overextended and poorly run investigation. In the end, the one at fault was able to hide behind whistleblower status at the expense of a good man who was simply doing his job. Chairman DeSantis, Ranking Member Lynch, our government must be better than this.

Thank you for your time and willingness to look into this important matter.

Mr. DESANTIS. Thank you. Pursuant to unanimous consent agreement, the Congressman will answer questions posed by myself and Ranking Member Lynch, and then will be excused for his business that he has to attend to. And the chair now recognizes himself for 5 minutes.

Congressman Zinke, can you just provide the context to when Losey got to SOCAFRICA? People had talked about it being based in Stuttgart, Germany, and some had said that it was kind of part of the wine-and-cheese circuit. What does that mean and kind of how did he approach getting the command in order?

Mr. ZINKE. Thank you, Mr. Chairman. And I can tell you on personal experience, I have known Brian Losey a long time. We served together at SEAL Team 6, and he was the red team lead. He is hard charging and fair. To say that Africa command is wine and cheese—I was stationed in Stuttgart and I believe I was gone 250 days out of the year, primarily in Kosovo and fighting the Bosnian wars. It is enormous responsibility of a commander at AFRICOM. It is far from wine and cheese. I would say it is an MRE on a hot rack.

Mr. DESANTIS. In terms of as a commander, when—and you have seen in the Navy, I have seen it, people abuse property, there are frauds that can be committed, and so obviously those things need to be ferreted out. When you have complaints against the commander to kind of undermine that authority, if you as a commander do need to take action but you have complaints that are baseless, in your judgment, but are hanging over you, will that chill your willingness, perhaps, to exercise your correct judgment?

Mr. ZINKE. You know, as a commander, you are obligated to do the right thing. And when you see actions that are either illegal or are not in order, you are obligated to take action, regardless of consequence. But I do think, under the circumstances, when the IG reports, you know, don't follow the law, there is a sense that a whistle holder—or whistleblower has the upper edge when a whistleblower can hide behind the law knowing that the bureaucracy, I think there is a sense of should I do the right thing or not? Because the consequences of doing the right thing may have a negative consequence, as what we see with Brian Losey.

At the end of the day, I think it is about the sanctity of command, is that when you are a commander, you are in charge those underneath you, whether it is a civilian or military. And when you see something wrong, you are obligated to take a stand and take action. But when that's interfered by a bureaucracy or a different layer which doesn't follow the law, that erodes the entire process of the Uniform Code of Military Justice and the sanctity of command.

Mr. DESANTIS. So what are your recommendations then, because I think that you are a supporter of having whistleblowers within the Department and all the agencies, be able to bring waste, fraud, and abuse to light? That's good for taxpayers. It is good for the American people. But then you also have this other component about how it can intercept with command authority. So what, if anything, do we need to do in Congress so that this situation doesn't happen again?

Mr. ZINKE. You know, there is absolutely a necessity to have whistleblowers protection. If you see something wrong in the military, whether you are a commander or a private, you have an obligation to make people aware of it and take action. I think that is incumbent upon the military force.

The question really is the IG. Who is he accountable to? Is he accountable to Congress? Is he accountable—do we have a fair system where you have the three branches of equal and separate powers? Right now, I would argue that perhaps the system in place is not equal and separate powers.

So I think holding the IG accountable certainly by Congress is a step in the right direction and making sure there is provision where acts conducted by a whistleblower or reprisal by a commander needs to be independently reviewed in a timely fashion. In this case, you know, 500 days, and it wasn't just one star Admiral Losey lost. He lost two. And this is an admiral that I know personally that has been in the forefront of the global war on terrorism. You know, he has served this country with great honor in some of the most sophisticated and toughest missions this country has ever had to conduct, and yet even he is subject to, my judgment, an unfair process.

Mr. DESANTIS. Great. I am about out of time, so I will yield, or I will recognize Mr. Lynch for 5 minutes.

Mr. LYNCH. Thank you. And again, I thank the gentleman for appearing before the committee and helping us with our work.

It surely appears that we have done a number of iterations to try to revamp and reform the Office of the Inspector General at DOD, and it is frustrating beyond our patience here. Some have suggested that we need to put sort of an independent or an outside inspector general on this case, not the Losey case but just the manner in which we're getting information from the Department of Defense.

I am sure that you know, our relationship up here with some of these agencies is somewhat adversarial. We try to get information from the FBI, we try to get information from the CIA, Department of Defense. Oftentime they play the redaction game or the waiting game with us, and it is exceedingly frustrating for us, representing the American people, when agencies act, you know, beyond the control of Congress.

On the other hand, whistleblowers, some people call them our first line of defense. In my opinion, they may be our first and last, because a lot of these agencies just refuse to give us information. The subpoenas, we play that subpoena game all the time, this is the chief investigatory committee in Congress, they play that game all the time. It doesn't matter what administration, Democrat or Republican, they still—it is like pulling teeth to get information from some of these agencies. The Defense budget is classified, so it makes it even more difficult in that respect.

What is—what do you think, as a Member and someone who is working very hard on this issue, you know, for your friend but also for the wider interest of the American people, do you think it is appropriate that we might appoint—adopt legislation to appoint a special independent inspector general on DOD matters to get to the truth of this and to eliminate some of the inconsistencies and flaws

in the system that may have worked against the interests of Rear Admiral Losey in this case?

Mr. ZINKE. Thank you. It is a great question. And I would say at the heart of the matter, you are absolutely right. Is the law itself should be blind, and when an agency can violate the law and hide behind a stonewalling, it frustrates us all. We just want to get the truth. And maybe the answer is to look at not just this IG but across the board. I mean, who does the IG report to? Who is he accountable to?

I think we should look at perhaps having the IGs accountable to Congress, because it is only, you know, our—it is our ability to be an equal and separate branch of government and have some oversight of what these agencies do. I think we all share the same frustration is when we ask, we subpoena, we beg, is that they oftentimes don't bother to give us the information we want or hide it or delay it, on both sides of the aisle. And I think what happens is the American public looks at this and say, you know, it is corrupt, we are not getting the right answers.

There should be a system in place where truth matters. And I would think the IGs themselves may be looking at a dual chain of command where the IGs are held accountable to Congress too, because we fund it, but it is hard to fund when you don't know where money is going or we sit in the—in these committees of jurisdiction and we can't get the truth.

Mr. LYNCH. I just want to, just to put a finer point on this. We do have some inspectors general that are extremely responsive to the committee. I don't want to paint everybody with a broad brush, especially with what we see that has been going under the previous—we have a new interim or acting inspector general, Mr. Fine, over at DOD, who seems to be getting things on track. I don't want to paint him with the same brush either. But in the past, we have had some serious difficulties there.

But I think DOD has been the outlier in this case. They have been the worst in terms of, you know, the DOD operation over there within the Office of the Inspector General at DOD. That has been a real problem here. I wouldn't want to paint all the others with that same broad brush.

Mr. ZINKE. Nor would I.

Mr. LYNCH. My time has expired. I yield back.

Mr. DESANTIS. Well, the chair thanks the gentleman from Montana for coming here offering his testimony and answering some questions. I know you have other engagements and so you are excused.

And we will do a short recess so that we can prepare the second panel.

[Recess.]

Mr. DESANTIS. The hearing will reconvene. We'll now recognize the witnesses on our second panel. I'm pleased to welcome the Honorable Glenn Fine, Principal Deputy Inspector General at the U.S. Department of Defense; Ms. Lori Atkinson, Assistant Director of Defense Capabilities and Management at the U.S. Government Accountability Office; and Ms. Mandy Smithberger, Director of the Straus Military Reform Project at the Project on Government Oversight.



Welcome to you all. Pursuant to committee rules, all witnesses will be sworn in before they testify. So if you can please rise and raise your right hand.

Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you. You can be seated.

The witnesses answered—all witnesses answered in the affirmative.

In order to allow time for discussion, please limit your testimony to 5 minutes. Your entire written statement will be made part of the record.

Inspector General Fine, you are recognized for 5 minutes.

#### **TESTIMONY OF GLENN FINE**

Mr. FINE. Chairman DeSantis, Ranking Member Lynch, and members of the subcommittee, thank you for inviting me to discuss the work of the Department of Defense Office of Inspector General regarding military whistleblower reprisal investigations.

Whistleblowers are important to exposing waste, fraud, and abuse in government programs, and they are instrumental in saving taxpayer money and improving the efficiency of government operations. They need to be protected from reprisals for their protected disclosures. Without such protections, individuals who can help save taxpayer money and possibly even save lives may not report crucial information about wrongdoing and waste.

The DOD OIG, therefore, seeks to conduct thorough, fair, and timely investigations into allegations of whistleblower reprisal. It is a challenging task, particularly given the burgeoning whistleblower reprisal caseload and our flat level of resources. However, we are committed to this critically important mission and we regularly consider how to improve our program.

First, with regard to the stated purpose of this hearing and the two GAO reports, it is important to note, as GAO stated in its testimony, that the GAO has already closed its implemented 15 out of 18 recommendations from both its 2012 and 2015 reports. The three final recommendations are in the progress of being implemented. That is significant progress.

However, I also want to point out additional steps and progress we have made toward improving whistleblower reprisal investigations even beyond what GAO has recommended. We provided training in whistleblower reprisal investigations to our OIG employees, as well as to over 1,000 personnel from DOD component IGs and other Federal OIGs.

We shoot guidance to DOD component IGs to properly notify complainants when military whistleblower reprisals will not be completed within 180 days. We deployed a defense case activity tracking system within the OIG for transmitting, storing, and retrieving data and documents and for managing and monitoring investigations. We developed an automated alert to help ensure compliance with the statutory notification requirement to provide servicemembers with accurate information regarding the status of their reprisal investigations within 180 days. This automated alert was implemented in April 2016, and we are providing such notices.

With regard to the three remaining GAO recommendations, the GAO recommended that we regularly report to Congress on the timeliness of military whistleblower reprisal investigations. We agree with the benefit of providing regular reports to Congress on the timeliness of such investigations, and we will do so regularly. We will provide the first such report on October 31st, 2016.

We are also taking steps to implement the remaining two GAO recommendations, including working with the Secretary of Defense to standardize whistleblower reprisal investigations throughout the Department.

In addition to these initiatives, I want to highlight other significant improvements we have made to our program. I have elevated the importance of the role of our whistleblower protection ombudsman by making it a full-time GS-15 position rather than a collateral duty. I've made clear that we should be expansive in our interpretation of whistleblower protection statutes.

I have promoted the need for greater transparency in the outcomes of whistleblower reprisal and other OIG administrative investigations. In particular, at my direction, we obtained a change to our Privacy Act Systems of Records Notice, and we are now proactively releasing the results of investigations when the public's right to know outweighs the individual's privacy rights even before the receipt of a FOIA request.

We have decided to handle all DOD reprisal cases stemming from reporting of sexual assault. We created a dedicated investigative unit to investigate these sexual assault reprisal cases. We are instituting an alternative dispute resolution program like that administered by OSC to pursue settlement of whistleblower cases separate and apart from the investigation process. This voluntary program can help reduce the cost and time for resolving certain whistleblower cases and it can allow limited investigative resources to be allocated to completing investigations in a timely manner.

Finally, I want to emphasize that the critical responsibility for the OIG when conducting whistleblower reprisal investigations is to follow the facts wherever they lead. If the evidence shows that an individual has been reprisal against, we need to conduct that investigation fully, fairly, timely, and substantiate the allegation. By the same token, if the evidence shows that the subject of the complaint did not reprise against the complainant, we need to find that and clear the subject in a timely manner. Both missions are important.

I also recognize that we are likely to receive criticism from either or both sides in the case, and the investigation regarding Rear Admiral Losey mentioned by Representative Zinke is an example of where disagreements can arise. But such criticism should not deter us from reaching objective conclusions based on the evidence. That is what we strive to do, and the measures that I have described are designed to improve our processes to meet that goal.

In sum, conducting whistleblower reprisal investigations is a critically important part of the OIG's work, and we are committed to continuously improving how we handle these challenging duties. That concludes my statement, and I would be glad to answer any questions.

[Prepared statement of Mr. Fine follows:]

September 7, 2016



Expected Release

2:00

Statement of  
Glenn A. Fine  
Principal Deputy Inspector General  
Performing the Duties of the Inspector General  
Department of Defense

before the

Subcommittee on National Security  
House Oversight and Government Reform Committee

on

"Oversight of the Department of Defense Office of Inspector  
General's Military Whistleblower Reprisal Investigations"

Good afternoon Chairman DeSantis, Ranking Member Lynch, and members of the Subcommittee. Thank you for inviting me to appear before you today to discuss the work of the Department of Defense Office of Inspector General (DoD OIG) regarding military whistleblower reprisal investigations.

Whistleblowers are important to exposing waste, fraud, and abuse in government programs, and they are instrumental in saving taxpayers' money and improving the efficiency of government operations. They need to be protected from reprisals for their protected disclosures. The DoD OIG is responsible for conducting investigations when whistleblowers allege they have suffered reprisal. We are also responsible for overseeing the investigative work of DoD Component IGs whenever they exercise delegated authority to investigate allegations of military reprisal or restriction, or certain types of civilian reprisal allegations. Without such investigations to protect whistleblowers from reprisal, individuals who can help save taxpayers' money – and possibly even save lives – may not report crucial information about wrongdoing and waste.

The DoD OIG therefore seeks to conduct thorough, fair, and timely investigations into allegations of whistleblower reprisal complaints. It is a challenging task, particularly given the burgeoning whistleblower reprisal caseload within DoD, as well as the flat level of resources for the OIG. However, we are committed to this critically important mission. In this regard, the DoD OIG regularly considers how to improve our programs, which I will describe below.

First, however, it is important to understand the increasing caseload. In the DoD OIG Semiannual Report (SAR) to Congress for the period ending March 31, 1997, the OIG reported having received 180 reprisal complaints and closed 95 cases. In the SAR report for the period

ending March 31, 2005, that number had increased – the DoD OIG received 284 reprisal complaints and closed 212 cases. In the 12 years since, the number of complaints has more than quadrupled. For the latest SAR for the period ending March 31, 2016, we reported having received 797 complaints and closed 610 cases. For the entire FY16 reporting period, we project approximately 1600 and 1200 respectively. At present, the DoD OIG has 192 open cases, and there are over 800 open cases across the Department.

Yet, growth in DoD OIG resources has lagged. The DoD OIG budget has not kept pace with the growth in the DoD's budget, and our budget clearly has not grown commensurate with our increased responsibilities, particularly in the whistleblower area. Nevertheless, we increased the resources we have devoted to whistleblower reprisal cases, and have steadily increased staffing our Whistleblower Reprisal Investigations (WRI) Directorate. In 2010, WRI had a staff of 28. By 2016, the WRI staff grew to 54 – the Director and Deputy Director; 32 investigators who conduct and supervise reprisal investigations; 13 investigators who perform and supervise oversight of investigations conducted by the military services and DoD Components; 4 program personnel who perform training, outreach, policy and statistical analysis responsibilities; and 3 investigative support personnel. However, these increases have still not been sufficient to keep up with the workload, which has not only increased in terms of the total number of complaints, but also increased in the number of complaints that require full investigation.

To address this need for increased staff, for FY 2018 we are seeking funding for 29 additional personnel for WRI, which we believe will help to improve the timeliness and effectiveness of reprisal investigations.

With respect to the focus of today's hearing, I would like to first address the two Government Accountability Office (GAO) reports regarding the OIG's military whistleblower protection program – one report was completed in 2012 and the other in 2015. GAO is currently conducting another review on the DoD civilian and contractor employee whistleblower protection program.

In the two completed reports, the GAO issued 18 recommendations for improvement. We have taken GAO's recommendations very seriously. Since release of the 2015 GAO report my senior staff and I are meeting with GAO on a quarterly basis to ensure we are making appropriate progress in the areas GAO identified for improvement.

In this regard, GAO acknowledged to us the many improvements the DoD OIG has made. As reflected in Ms. Atkinson's testimony, GAO has already closed as implemented, 15 out of the 18 recommendations from both its 2012 and 2015 reports. The final three recommendations are in the process of being implemented.

Indeed, I want to point out additional steps and progress we have made toward improving whistleblower reprisal investigations. In some cases these steps go beyond what GAO has recommended.

Examples of our progress include:

- We provided specialized training in whistleblower reprisal investigations to OIG employees, as well as to over 1,000 personnel from DoD Component IGs and other Federal Agency OIGs.

- We issued policy guidance to DoD Component IGs to properly notify complainants when military reprisal investigations will not be completed within 180 days.
- We deployed the Defense Case Activity Tracking System (D-CATS) within DoD OIG for transmitting, storing, retrieving data and documentation, and for managing and monitoring investigations.
- We issued a D-CATS User Guide, a D-CATS Data Entry Guide, and an expanded version of the Data Entry Guide, to staff, all accompanied by mandatory training to all WRI staff.
- We developed a properly-coordinated implementation plan to further develop and deploy D-CATS to DoD Component IGs as a standardized enterprise case management system throughout DoD.
- We publicly issued the new “Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints” in October 2014, which includes downloadable templates for use by DoD Component IG investigators in the field.
- We reissued DoD Directive 7050.06, “Military Whistleblower Protection,” on April 17, 2015, which requires DoD Component IGs to complete military reprisal intakes within 30 days, to submit military reprisal reports of investigation for oversight within 150 days of the filing of the complaint, and to make recommendations of specific remedies to make whistleblowers whole in substantiated cases.

- We developed an automated alert to help ensure compliance with the statutory notification requirement to provide service members with accurate information regarding the status of their reprisal investigations within 180 days of receipt of an allegation of military reprisal. This automated alert was implemented in the current release of D-CATS, as of April 22, 2016.
- We formed a working group, led by the Director of WRI and composed of key representatives from DoD Component IGs to seek agreement on universally defined investigative stages and more standardized processes. The working group has met five times, most recently on July 20, 2016, and is scheduled to meet again next week.
- We issued our new Administrative Investigations manual in March 2016 that includes a description of the oversight process by DoD OIG of DoD Component IGs procedures.
- We posted our entire Administrative Investigations manual on our public web page to increase transparency of how we conduct whistleblower reprisal and military restriction investigations and how we provide oversight of such investigations conducted by DoD Component IGs.

As a result of these and other actions the GAO closed 15 of its 18 recommendations. We are also addressing the three remaining GAO recommendations. With regard to the three remaining recommendations, GAO recommended that we regularly report to Congress on the timeliness of military reprisal investigations, including the number of cases exceeding the 180 days provided by law. We agree with the need and benefit of providing regular reports to Congress on the timeliness of military whistleblower reprisal investigations, and we will provide



this information to our Congressional oversight committees of jurisdiction on a semiannual basis. We do not believe such information should be reported in the Semiannual Report to Congress (SAR), as the GAO originally suggested, because the Inspector General Act describes in detail what should be included in the SAR. However, we agree with the GAO's recommendation to provide the timeliness statistics to Congress every six months, in a separate letter to Congress. We will provide the first such report on October 31, 2016.

Second, GAO recommended that we regularly report to Congress on the frequency and type of corrective action taken in response to substantiated reprisal claims. We agree with this recommendation and currently report that information in a narrative fashion in our SAR. Additionally, we have tasked the D-CATS developers to modify the database system in a manner that will allow us to run queries identifying missing corrective actions or remedies. Once these changes are implemented to D-CATS, we will be able to better analyze trends with respect to corrective actions taken in substantiated cases and specify the frequency and trends in types of corrective actions taken across the Department.

Third, GAO recommended that the Secretary of Defense, in coordination with the DoD OIG, direct the Military Service IGs to follow standardized investigative stages and issue guidance clarifying how the stages are defined. We agree with GAO that the Secretary of Defense has broad authority to establish investigative policy for whistleblower reprisal investigations throughout the Department, and we will work with the Secretary to implement this recommendation. Before such direction is issued, we are working with the Military Service IGs to seek standardized investigative stages for them to implement.

In addition to the initiatives detailed above, I want to highlight other significant improvements we have made to our whistleblower reprisal investigative program:

- I have elevated the importance of the role of our Whistleblower Protection Ombudsman by making it a fulltime, GS-15 position rather than a collateral duty.
- I have made clear that we should be expansive in our interpretation of whistleblower protection statutes. For example, on April 11, 2016, I reviewed a letter from several members of Congress regarding a contractor employee case which the DoD OIG had originally dismissed on narrow, technical grounds concerning the content of the employee's disclosure. I concluded that we should have opened an investigation in the case and been more expansive in our interpretation of the statute. We therefore re-opened that case and a related case filed by a co-worker. I also directed OIG staff to institute a more expansive approach to evaluating disclosures by contractor and subcontractor employee whistleblowers and actions alleged to have been taken against them in reprisal. We are currently conducting 32 investigations under the contractor/subcontractor employee reprisal statute, 10 U.S.C. 2409.
- I have reinforced to our investigators the need to consider both circumstantial and direct evidence of reprisal in their case analysis.
- I have promoted the need for greater transparency in the outcomes of whistleblower reprisal and other OIG administrative investigations. In particular, at my direction, the OIG obtained a change to our Privacy Act System of Records Notice (SORN) routine uses, which now allows the OIG to proactively release investigative reports in which the public's right to know outweighs the individual's privacy rights. As a result, we are proactively conducting the balancing test and publicly releasing the

results of investigations, when appropriate, even before receipt of a FOIA request. While our proactive release policy is new, we have already publicly released one substantiated whistleblower reprisal investigative report, and we intend to release another such report in the near future.

- I have also emphasized the priority for aggressive and thorough investigations of whistleblower reprisal complaints involving sexual assault. The DoD OIG has decided to now handle all DoD reprisal cases stemming from reporting of a sexual assault. We have also created a dedicated investigative unit to investigate such sexual assault reprisal cases. This unit has received training on Sexual Assault Prevention Response Office (SAPRO) policies and procedures. In fact, this week this team will receive specialized training in sexual assault trauma from a recognized expert in the field. This specialized training fulfills a recommendation of the Judicial Proceedings Panel that this work should be handled exclusively by DoD OIG investigators who have received specialized training in sexual assault trauma.
- We are emphasizing that sexual assault reprisal cases are a priority and that military members are aware that complaints of this type will be handled by our specialized team. For example, in July 2016 at DoD OIG's observance of National Whistleblower Appreciation Day, we invited a military sexual assault victim, whose reprisal complaint was substantiated by the DoD OIG earlier this year, to address a worldwide audience throughout the Federal Hotline and DoD OIG community about the retaliation she experienced and lessons learned following the investigative process.

- We are instituting an alternative dispute resolution program, like that administered by the Office of Special Counsel, to pursue settlement of whistleblower cases separate and apart from the investigation process. This voluntary program can help reduce the cost and time for resolving certain whistleblower cases, and it can also allow limited investigative resources to be allocated to completing investigations in a timely manner.

As noted above, the DoD OIG also conducts oversight reviews of military reprisal and restriction, and certain civilian reprisal, investigations conducted by DoD Component IGs. However, we can do better in this area, particularly in the area of timeliness of our oversight reviews. An important part of our new approach to oversight is a program we are implementing that will assess, at a minimum of every 3 years, the overall quality of the whistleblower protection programs run by DoD Component IGs. Initially, this program will focus on the whistleblower protection programs run by those DoD Component IGs handling the greatest volume of whistleblower reprisal cases. Such reviews, similar to peer reviews conducted within the federal IG community, will assist us in identifying systemic issues, recommendations for improvement, and best practices for DoD Component IGs to implement.

Finally, I want to emphasize that a critical responsibility for the OIG, when conducting whistleblower reprisal investigations, is to follow the facts wherever they lead. If the evidence shows that an individual has been reprisal against because of a protected communication or disclosure, we need to conduct that investigation fully, fairly, timely, and substantiate the allegation. By the same token, if the evidence shows that the subject of the complaint did not reprise against the complainant, we need to find that, and clear the subject, in a timely manner.

Both missions are important. I also recognize that we are likely to receive criticism from either or both parties in a case. But such criticism should not deter us from timely and thoroughly investigating the case and reaching objective conclusions based on the evidence. That is what we strive to do, and the measures that I have described are designed to improve our processes to meet that goal.

In sum, conducting whistleblower reprisal investigations is a critically important part of the OIG's work. We are committed to continuously improving how we handle these challenging duties. Thank you for the opportunity to discuss how we are seeking to fulfill this important mission.

This concludes my statement and I would be glad to answer questions.

Mr. DESANTIS. Thank you.

Ms. Atkinson, you're recognized for 5 minutes.

**TESTIMONY OF LORI ATKINSON**

Ms. ATKINSON. Chairman DeSantis, Ranking Member Lynch, and members of the subcommittee, thank you for the opportunity to be here today to discuss DOD Inspector General's progress on improving its whistleblower reprisal program for military servicemembers. Let me briefly summarize my statements.

Whistleblowers play an important role in safeguarding the Federal Government against waste, fraud, and abuse, and their willingness to come forward can contribute to improvements in government operations. However, whistleblowers also risk reprisal, such as demotion, reassignment, and firing.

We found in our recent reports that DOD IG oversight of military whistleblower reprisal program faced challenges. For example, we found that DOD IG was not consistently or accurately recording key dates to track the length of investigations, did not report the timeliness of its investigations to Congress, had outdated guidance about the process, and had not established performance metrics to ensure the quality of its investigations.

My statement today is primarily based on GAO's February 2012 and May 2015 reports that contain 18 recommendations to DOD to improve tracking investigation timeliness and strengthening oversight of military service's investigations.

For this statement, we followed up with DOD IG officials to determine what actions they had taken in response to the recommendations we made. There are three main points for my statement I would like to discuss here.

First, DOD IG has made progress and taken action to address our recommendations to improve its tracking of timeliness and to strengthen its oversight of investigations. For example, in our recent report, we found that DOD did not meet the statutory requirement to notify servicemembers within 180 days about delays, and about half of the reprisal investigations closed since fiscal year 2013. In response, DOD developed an automated tool in its case management system to flag investigations that were approaching 180 days.

Second, DOD has not taken action to regularly report to Congress on the timeliness of its investigations nor on the frequency and type of corrective actions taken in response to substantiated reprisal claims. DOD IG reports some corrective actions in its semi-annual report to Congress, but that reporting does not include all corrective actions nor address outstanding corrective action recommendations. We continue to believe that without such information, Congress will be hindered in its ability to provide oversight of the corrective actions portion of the military whistleblower reprisal program.

I would also like to note that just last week we received a letter from DOD IG stating that it plans to begin reporting the timeliness of investigations to Congress on a biannual basis. We are encouraged by this step and look forward to the first report this fall.

Finally, we found that DOD IG and the military service IGs use different terms in their guidance to refer to their investigations,

which hindered DOD IG's ability to consistently classify and assess the completeness of cases during oversight reviews. For example, DOD IG investigators miscoded approximately 43 percent of the cases that DOD IG closed in fiscal year 2013 as full investigations when the service reports indicate they were preliminary inquiries.

In 2015, we recommended that the Secretary of Defense, in coordination with DOD IG, direct the military services to follow standardized investigation stages and issue guidance to clarify how the stages are defined. DOD concurred with this recommendation and subsequently updated its guide; however, this guide is characterized as best practices. We continue to believe that by directing the services to follow standardized investigation stages, DOD IG will be better able to ensure consistent program implementation and consistent treatment of servicemember complaints.

In summary, Mr. Chairman, DOD has taken actions to implement the majority of the recommendations we made to address timeliness and oversight challenges we identified. Fully implementing our other recommendations would further strengthen DOD IG's capacity to assess the quality of military investigations and enhance Congress' visibility into timeliness as well as corrective actions taken for substantiated allegations.

We look forward to continuing to work with the DOD IG on our ongoing work which is focused on reprisal investigations of DOD civilians and contractors. That concludes my remarks, and I will be pleased to take any questions that you and the members of the subcommittee may have.

[Prepared statement of Ms. Atkinson follows:]



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United States Government Accountability Office

Testimony

Before the Subcommittee on National  
Security, Committee on Oversight and  
Government Reform, House of  
Representatives

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## WHISTLEBLOWER PROTECTION

DOD Has Improved  
Oversight for Reprisal  
Investigations, but Can  
Take Additional Actions to  
Standardize Process and  
Reporting

Statement of Lori Atkinson, Assistant Director,  
Defense Capabilities and Management



## GAO Highlights

Highlights of GAO-16-860T, a testimony before the Subcommittee on National Security, Committee on Oversight and Government Reform, House of Representatives

### Why GAO Did This Study

Whistleblowers play an important role in safeguarding the federal government against waste, fraud, and abuse, and their willingness to come forward can contribute to improvements in government operations. However, whistleblowers also risk reprisal, such as demotion, reassignment, and firing.

This testimony discusses DODIG's progress in (1) taking actions to track and report on the timeliness of military whistleblower reprisal investigations, and (2) strengthening its oversight of the military services' whistleblower reprisal investigations.

GAO's statement is based primarily on information from May 2015 and February 2012 GAO reports on military whistleblower reprisal investigations. For those reports, GAO examined laws, regulations, and DOD guidance; conducted detailed file reviews using representative samples of cases closed in fiscal year 2013 and between January 2009 and March 2011; analyzed DODIG and military service data for cases closed in fiscal years 2013 and 2014; and interviewed DOD officials. GAO also determined what actions DOD had taken through August 2016 in response to recommendations made in the 2015 and 2012 reports.

### What GAO Recommends

DOD implemented 15 of the 18 recommendations GAO made to improve and track investigation timeliness and strengthen oversight of the military services' investigations, and is considering steps to implement the remaining three regarding standardized investigations and reporting to Congress.

View GAO-16-860T. For more information, contact Brenda S. Farrell at (202) 512-3604 or [FarrellB@gao.gov](mailto:FarrellB@gao.gov), or Lori Atkinson at (404) 679-1852, or [AtkinsonL@gao.gov](mailto:AtkinsonL@gao.gov).

September 7, 2016

## WHISTLEBLOWER PROTECTION

### DOD Has Improved Oversight for Reprisal Investigations, but Can Take Additional Actions to Standardize Process and Reporting

#### What GAO Found

The Department of Defense Office of Inspector General (DODIG) has taken actions to improve its tracking of the timeliness of military whistleblower reprisal investigations in response to recommendations that GAO made in 2012 and 2015. For example, in 2012 and 2015, GAO found that DOD was not meeting its internal requirement to complete whistleblower reprisal investigations within 180 days, with cases closed in fiscal years 2013 and 2014 averaging 526 days. In response, DODIG—which is responsible for both conducting investigations and overseeing investigations conducted by the military services—took steps to better track and analyze timeliness data by developing a guide to help ensure the accurate tracking of case processing time and by updating its case management system in April 2016 to include new investigation milestones. Because these actions were not taken until 2016, it is too early to determine if timeliness has improved since GAO last reported on the status. Similarly, in 2015, GAO found that DOD had not met the statutory requirement to notify servicemembers within 180 days about delays in their investigations for about half of the reprisal investigations closed in fiscal year 2013. In response, DODIG developed an automated tool in its case management system to flag cases approaching 180 days. However, DODIG continues to not regularly report to Congress on the timeliness of military whistleblower reprisal investigations as GAO recommended in 2012. On August 31, 2016, a senior DODIG official stated that DODIG will implement this recommendation by reporting timeliness information to Congress biannually.

DODIG has strengthened its oversight of military service reprisal investigations in response to recommendations GAO made in 2012 and 2015 by establishing processes and developing guidance for overseeing investigations, among other things. For example, in 2015, GAO found that DODIG did not have a process for documenting whether investigations were independent and were conducted by someone outside the military service chain of command. In response, DODIG directed the service IGs to certify investigators' independence for oversight reviews. GAO also found in 2015 that DODIG had provided limited guidance to investigators using its case management system, limiting its utility as a real-time management system, as intended. In response, DODIG issued a system guide and a data entry guide, which provide key information on how to work with and maintain system data. However, in 2015 GAO also found that DODIG and the military service IGs used different terms in their guidance to investigators, hindering DODIG oversight of case completeness. GAO recommended that DOD direct the military service IGs to follow standardized investigation stages and issue related guidance. DODIG officials stated in August 2016 that they are working with the services to standardize investigation stages and that DODIG is willing to work with the Secretary of Defense to issue such direction. Separately, GAO found in 2012 that unreliable data on corrective actions taken in response to substantiated reprisal cases was hampering oversight and recommended that DOD regularly report to Congress on the frequency and type of corrective actions taken in response to substantiated reprisal claims. DODIG reports some corrective actions in its semiannual report to Congress, but does not include all relevant corrective actions or outstanding corrective action recommendations.

United States Government Accountability Office

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Chairman DeSantis, Ranking Member Lynch, and Members of the Subcommittee:

Thank you for the opportunity today to discuss the Department of Defense's (DOD) progress on improving its whistleblower reprisal program for military servicemembers. Whistleblowers play an important role in safeguarding the federal government against waste, fraud, and abuse, and their willingness to come forward can contribute to improvements in government operations. However, whistleblowers also risk reprisal, such as demotion, reassignment, and firing. According to the 2014 *Federal Employee Viewpoint Survey*, 18 percent of DOD employees surveyed did not feel they could disclose a suspected violation of any law, rule, or regulation without fear of reprisal.<sup>1</sup>

In 1988, Congress enacted the Military Whistleblower Protection Act to provide protections from reprisal for servicemembers who report wrongdoing within DOD.<sup>2</sup> Under this law's implementing directive, military servicemembers may submit reprisal complaints to DOD's Office of Inspector General (DODIG) or to a military service Inspector General (IG). DODIG can conduct an investigation into a military reprisal complaint or refer the investigation to the appropriate military service IG, but DODIG has the final responsibility for approving the results of all investigations.<sup>3</sup> The majority of DODIG's investigation workload for military reprisal cases is related to oversight reviews of investigations conducted by the military service IGs. According to a senior DODIG official at the time of our last review in May 2015, DODIG referred most military whistleblower reprisal cases to the service IGs for investigation, but retained cases that are high profile or involve (1) issues such as sexual assault, (2) senior officers, and (3) members from different services or a joint base or command.

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<sup>1</sup> Office of Personnel Management, *2014 Federal Employee Viewpoint Survey Results*, Department of Defense Agency Management Report.

<sup>2</sup> National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846 (1988), codified at 10 U.S.C. § 1034, as amended.

<sup>3</sup> Department of Defense Directive 7050.06, *Military Whistleblower Reprisal* (Apr. 17, 2015). The military department IGs include the IG of the Army, the Naval IG, the IG of the Air Force, and the Marine Corps IG. In this statement, we refer to these organizations collectively as the service IGs.

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Our prior work has found that DODIG's oversight of the military whistleblower reprisal program has faced challenges. For example, in February 2012 and May 2015, we reported, among other things, that the DODIG was not consistently or accurately recording key dates to track the length of investigations, did not report the timeliness of its investigations to Congress, had outdated guidance about the investigation process, and had not established performance metrics to ensure the quality of its investigations.<sup>4</sup> We made 18 recommendations to DOD to improve the timeliness of military whistleblower reprisal investigations, as well as to improve the investigation and oversight processes, among other things. DOD concurred with all of these recommendations.

I will focus my remarks today on DODIG's progress in (1) taking actions to track and report on the timeliness of military whistleblower reprisal investigations and (2) strengthening its oversight of the military services' military whistleblower reprisal investigations.

My testimony is based primarily on the reports that we issued on military whistleblower reprisal investigations in May 2015 and February 2012. For those reports, we examined laws, regulations, and DOD guidance; conducted detailed file reviews using representative samples of cases closed in fiscal year 2013 and between January 1, 2009 and March 31, 2011; analyzed DODIG and military service IG data for cases closed in fiscal years 2013 and 2014; and interviewed officials from DODIG and the military service IGs, among other things. Additional details on our scope and methodology can be found in the two issued reports. For this testimony, we also followed up with DODIG officials to determine what actions they had taken through August 2016 in response to our 18 recommendations. The work on which this testimony is based was performed in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>4</sup> GAO, *Whistleblower Protection: Actions Needed to Improve DOD's Military Whistleblower Reprisal Program*, GAO-12-362 (Washington, D.C.: Feb. 22, 2012) and GAO, *Whistleblower Protection: DOD Needs to Enhance Oversight of Military Whistleblower Reprisal Investigations*, GAO-15-477 (Washington, D.C.: May 7, 2015).

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**DOD Has Taken  
Actions to Track the  
Timeliness of Military  
Whistleblower  
Reprisal  
Investigations but  
Continues to Not  
Regularly Report on  
Timeliness to  
Congress**

DODIG has taken a number of actions to improve its tracking of the timeliness of military whistleblower reprisal investigations, including developing an automated tool to address statutory notification requirements. However, DODIG does not regularly report to Congress on the timeliness of military whistleblower reprisal investigations.

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**DOD Has Made Progress  
in Tracking the Timeliness  
of Investigations**

In both 2012 and 2015, we found that DOD was not meeting its internal timeliness requirements for completing military whistleblower reprisal investigations within 180 days. Specifically, in 2012 we found that despite undertaking efforts to improve timeliness—such as changing its process for taking in complaints—DOD took a mean of 451 days to process cases, and that its efforts to improve case processing times were hindered by unreliable and incomplete data on timeliness.<sup>5</sup> Further, in 2015 we found that DOD's average investigation time for cases closed in fiscal years 2013 and 2014 was 526 days, almost three times DOD's internal completion requirement of 180 days.<sup>6</sup> DOD Directive 7050.06, which implements 10 U.S.C. § 1034 and establishes DOD policy, states that DODIG shall issue a whistleblower reprisal investigation report within 180 days of the receipt of the allegation of reprisal.<sup>7</sup>

To improve the timeliness of military whistleblower reprisal investigations, we recommended in February 2012 that DOD (1) implement procedures

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<sup>5</sup> This estimate (+/- 94 days) is based on our analysis of a random sample of 91 cases closed from January 1, 2009, through March 31, 2011.

<sup>6</sup> This average does not include cases that DODIG dismissed after completing the intake process.

<sup>7</sup> Department of Defense Directive 7050.06, *Military Whistleblower Protection* (Apr. 17, 2015).

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to track and report data on its case processing timeliness and (2) track and analyze timeliness data to identify reforms that could aid in processing cases within 180-day time frame. DOD concurred and subsequently took several actions to implement these recommendations. For example, in December 2012 DODIG began implementing a case management system to collect key dates to track the timeliness of DODIG's investigative phases and in March 2016 issued a case management system guide that established procedures to help ensure accurate and complete recording and consistent tracking of case processing time. Further, DODIG took steps to track and analyze timeliness data that could aid in processing cases within the 180-day timeframe by compiling quarterly timeliness metrics starting in fiscal year 2014, and by updating its case management system in April 2016 to include additional investigation milestones. Because some of these actions were not taken until 2016, it is too early to determine whether timeliness has improved since we last reported on the status.

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**DOD Recently Developed  
an Automated Tool to  
Address Statutory  
Notification Requirements**

In both our 2012 and 2015 reports, we found that DOD generally did not meet statutory requirements for notifying servicemembers within 180 days about delays in investigations. According to 10 U.S.C. § 1034 if, during the course of an investigation, an IG determines that it is not possible to submit the report of investigation to the Secretary of Defense and the service Secretary within 180 days after the receipt of the allegation, the IG shall provide to the Secretary of Defense, the service Secretary concerned, and the servicemember making the allegation a notice of that determination including the reasons why the report may not be submitted within that time and an estimate of the date when the report will be submitted.<sup>8</sup> In 2012, we found that neither the DODIG nor military service IGs had been making the required notifications. During that review, DODIG changed its practice and started reporting this information in October 2011 and identified steps in an action plan to help ensure that it and the military service IGs followed the statutory reporting requirements.

During our 2015 review, DODIG officials stated that they had taken additional steps to help ensure they met the statutory notification requirement. For example, DODIG assigned an oversight investigator to

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<sup>8</sup> DODIG considers its office to be in accordance with the statute as long as it either completes the investigation within 180 days or submits a letter to the servicemember within 180 days, according to a senior DODIG official.

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remind the service IGs to send the required letters and developed a mechanism in DODIG's case management system to indicate which cases were older than 180 days. However, during our 2015 review, we again found that DOD had not sent the required letters to notify servicemembers about delays in their investigations in about half of reprisal investigations closed in fiscal year 2013;<sup>9</sup> that the median notification time for servicemembers receiving the required letter was about 353 days after the servicemember filed the complaint; and that the letters that DOD had sent, on average, had significantly underestimated the date by which the investigation would be completed.<sup>10</sup>

Consequently, we recommended in our 2015 report that DOD develop an automated tool to help ensure compliance with the statutory 180-day notification requirement by providing servicemembers with accurate information regarding the status of their reprisal investigations within 180 days of receipt of an allegation of reprisal. DOD concurred with this recommendation and in April 2016, launched an automated tool within its case management system to help ensure compliance with the statutory 180-day notification requirement, instead of relying on its manual reconciliation process. Specifically, the case management system now has an alert that provides the age of the case and the date by which the notification letter must be transmitted to the required parties. This tool is to help provide assurance that servicemembers are being notified of the status of their reprisal investigations.

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**Timeliness Information Is  
Still Not Regularly  
Reported to Congress**

In 2012, we found that although DODIG is required to keep Congress fully and currently informed through, among other things, its semiannual reports to Congress, DODIG was not including in these reports information on military whistleblower case processing time, including (1) statutorily required notifications of delays in the investigations or (2) those exceeding DODIG's internal 180-day completion requirement. The semiannual report to Congress is required to include information on fraud, abuses, and deficiencies related to the administration of programs and operations managed or financed by DOD, but DOD interpreted this requirement as not applying to the military whistleblower reprisal

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<sup>9</sup> This estimate has a margin of error of plus or minus 9 percentage points at the 95-percent confidence interval.

<sup>10</sup> The notification time estimate has a relative margin of error of plus or minus 20 percent of the estimate.

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program.<sup>11</sup> Because Congress is the primary oversight body for DODIG, we recommended that DOD regularly report to Congress on the timeliness of military whistleblower reprisal investigations, including those exceeding the 180-day timeframe. DOD concurred with our recommendation. On August 31, 2016, the DOD Principal Deputy Inspector General performing the duties of the DOD Inspector General stated that the office will implement this recommendation by regularly reporting timeliness information to Congress on a biannual basis. We believe that if this action is taken, it will fully implement our recommendation, provide Congress with enhanced visibility over the status of military whistleblower reprisal investigations, and thereby improve decisionmakers' ability to effectively oversee the military whistleblower reprisal program.

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**DOD Strengthened  
Its Oversight of  
Military Whistleblower  
Reprisal  
Investigations, but  
Additional Actions Are  
Needed**

**DOD Established  
Processes and Developed  
Guidance to Strengthen Its  
Oversight of Military  
Whistleblower Reprisal  
Investigations**

In 2012 and 2015, we found that DODIG's oversight of military whistleblower reprisal investigations conducted by the military services was hampered by insufficient processes, including performance metrics; guidance; and plans. DOD subsequently took steps to strengthen its oversight of military whistleblower reprisal investigations conducted by the military services by establishing processes and developing guidance for overseeing these investigations—along with a plan to expand its case management system to the services.<sup>12</sup>

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<sup>11</sup> See 5 U.S.C. App. § 4 and Department of Defense Directive 5106.01, Inspector General of the Department of Defense (IG DOD) (Apr. 20, 2012) (incorporating Change 1, Aug. 19, 2014).

<sup>12</sup> DOD also took action to address five other recommendations related to its oversight of military whistleblower reprisal investigations that we do not discuss in this statement.

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**Processes**

In 2012, we found that DODIG lacked reliable data on the corrective actions taken in response to substantiated whistleblower reprisal cases, thus limiting the visibility and oversight DOD and Congress have of the final portion of the military whistleblower reprisal process. DOD Directive 7050.06 directs the Secretaries of the military departments and the heads of the other DOD components to take corrective action based on IG reports of investigations of military whistleblower reprisal allegations and to notify DODIG of the actions taken within 10 working days.<sup>13</sup> Further, DODIG requires that the service IGs report back to DODIG on command actions taken against the individual alleged to have reprisal against a whistleblower, according to officials from these organizations. However, in 2012 we found that DODIG had not been maintaining reliable information on command actions needed to oversee this process. Specifically, for 40 percent of all substantiated cases that DODIG closed from October 1, 2005, through March 31, 2011, the database that DODIG used during that period did not contain information on the command actions taken.

As a result, we recommended in our 2012 report that DOD (1) establish standardized corrective action reporting requirements, and (2) consistently track and regularly reconcile data regarding corrective actions. DOD addressed these recommendations by issuing an update to its military whistleblower directive in April 2015 that required standardized corrective action reporting requirements by the services. DODIG also issued additional guidance in its March 2016 investigations manual requiring that investigators populate data fields for corrective actions and remedies. Finally, DODIG provided us with a report in April 2016 detailing its tracking of corrective actions taken in response to substantiated reprisal cases between October 2011 and January 2016.

In 2012, we also found that DODIG had not yet fully established performance metrics for ensuring the timeliness and quality of whistleblower reprisal investigations but was taking steps to establish timeliness metrics that focused on investigation processing time. Federal internal control standards state that metrics are important for identifying and setting appropriate incentives for achieving goals while complying with law, regulations, and ethical standards.<sup>14</sup> Further, we found in our

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<sup>13</sup> DOD Directive 7050.06 sections 5.3.3 and 5.4.2 (Jul. 23, 2007).

<sup>14</sup> GAO, *Internal Control Management and Evaluation Tool*, GAO-01-1008G (Washington, D.C.: Aug. 2001).



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previous work that metrics on both timeliness and quality—such as completeness of investigative reports and the adequacy of internal controls—can enhance the ability of organizations to provide assurance that they are exercising all of the appropriate safeguards for federal programs.<sup>15</sup> During our 2012 review, DODIG officials stated that they recognized the importance of both timeliness and quality metrics and that they planned to develop quality metrics as part of their effort to improve case management and outcomes. They further noted that quality metrics could include measuring whether interviews are completed and documented and whether conclusions made about the case are fully supported by evidence. To assist DOD in improving oversight of the whistleblower reprisal program, we recommended in our 2012 report that DOD develop and implement performance metrics to ensure the quality and effectiveness of the investigative process, such as ensuring that the casefiles contain evidence sufficient to support the conclusions.

DOD concurred with our recommendation and in 2014 fully developed timeliness metrics, along with some performance metrics to assess the completeness of a sample of (1) DODIG-conducted whistleblower reprisal investigations and (2) DODIG oversight reviews of the military services whistleblower reprisal investigations. For example, now DODIG is to complete internal control checklists for investigations it conducts and oversight worksheets for investigations conducted by the military services to determine whether casefiles are compliant with internal policy and best practices. On a quarterly basis, DODIG is to draw a sample of the checklists and oversight worksheets for cases closed by DODIG and the military service IGs and compare these checklists to the quality metrics that it developed. According to DODIG officials, these metrics were briefed to the DOD Inspector General in fiscal year 2014. DODIG officials stated in July 2016 that they continued to conduct quality assurance reviews and collect associated metrics in fiscal year 2015, but that they have not briefed these metrics to the DOD Inspector General since fiscal year 2014 and that changes to the metrics briefings are forthcoming per direction from the DOD Inspector General and Principal Deputy Inspector General. DODIG did not provide information on the nature of these changes. While we believe that DODIG's actions should help oversee the quality of investigations, we will continue to work with the DODIG and

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<sup>15</sup> GAO, *DOD Personnel Clearances: Comprehensive Timeliness Reporting, Complete Clearance Documentation, and Quality Measures Are Needed to Further Improve the Clearance Process*, GAO-09-400 (Washington, D.C.: May 19, 2009).

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monitor its progress in implementing and communicating these performance metrics during our ongoing review assessing whistleblower reprisal investigation processes for DOD civilian employees and contractors. Further, we also believe that until the military services follow standardized investigation stages, as discussed later in this statement, it will be difficult for the DODIG to consistently measure the quality of the services' military whistleblower reprisal investigations.

Separately, in 2015, we found that DODIG and the service IGs had processes for investigators to recuse themselves from investigations, but there was no process for investigators to document whether the investigation they conducted was independent and outside the chain of command. Council of the Inspectors General on Integrity and Efficiency standards state that in all matters relating to investigative work, the investigative organization must be free, both in fact and appearance, from impairments to independence. Further, guidance for documenting independence is included in generally accepted government auditing standards, which can provide guidance to service IGs as a best practice on how to document decisions regarding independence when conducting reprisal investigations.<sup>16</sup>

At the time of our 2015 review, DODIG officials stated that their recusal policies for investigators, their decentralized investigation structure, and their removal of the investigator from the chain of command adequately addressed independence issues and that no further documentation of independence was needed. However, during the case file review we conducted for our 2015 report, we identified oversight worksheets on which DODIG oversight investigators had noted potential impairments to investigator objectivity in the report of investigation.<sup>17</sup> For example, one oversight worksheet stated that the report gave the appearance of service investigator bias, and another oversight worksheet stated that the investigator was not outside the chain of command, as is statutorily required.<sup>18</sup> DODIG approved these cases without documenting how it had

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<sup>16</sup> GAO, *Government Auditing Standards*, GAO-12-331G (Washington, D.C.: Jan. 20, 2012).

<sup>17</sup> The oversight investigators are to document their review using an oversight worksheet, which captures information about how the service investigation was conducted as well as the investigation's findings and conclusions. DODIG has used various versions of this oversight worksheet since it established the oversight team in September 2011.

<sup>18</sup> We did not question DODIG's judgment in these cases.

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	<p>reconciled these case deficiencies. As a result, in our 2015 report we recommended that DOD develop and implement a process for military service investigators to document whether the investigation was independent and outside the chain of command and direct the service IGs to provide such documentation for review during the oversight process. DOD concurred with this recommendation and issued a memorandum in June 2015 that informed service IGs that DODIG would look for certification of an investigator's independence during its oversight reviews. Concurrently, DODIG also directed the service IGs to provide such documentation.</p>
Guidance	<p>In 2012, we found that DODIG was updating its guidance related to the whistleblower program but that the updates had not yet been formalized and that the guidance that existed at that time was inconsistently followed. According to the Council of the Inspectors General on Integrity and Efficiency's quality standards for investigations, organizations should establish appropriate written investigative policies and procedures through handbooks, manuals, directives, or similar mechanisms to facilitate due professional care in meeting program requirements. Further, guidance should be regularly evaluated to help ensure that it is still appropriate and working as intended. However, in 2012 we found, among other things, that DODIG's primary investigative guide distributed to investigators conducting whistleblower reprisal investigations had not been updated since 1996 and did not reflect some investigative processes that were current in 2012. Additionally, because guidance related to key provisions of the investigative process was unclear, it was being interpreted and implemented differently by the service IGs. As a result, we recommended in our 2012 report that DODIG update its whistleblower reprisal investigative guidance and ensure that it is consistently followed, including clarifying reporting requirements, responsibilities, and terminology. DOD concurred with this recommendation and in October 2014 released a guide of best practices for conducting military reprisal investigations and in April 2015 updated Directive 7050.06 on military whistleblower protection, which established policies and assigned responsibilities for military whistleblower protection and defined key terminology.</p> <p>Separately, in 2015 we found that DODIG had provided limited guidance to users of its case management system on how to populate case information into the system. The case management system, in use since December 2012, was to serve as a real-time complaint tracking and investigative management tool for investigators. DOD's fiscal year 2014 performance plan for oversight investigators notes that investigators</p>

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should ensure that the case management system reflects current, real-time information on case activity. This intent aligns with Council of the Inspectors General on Integrity and Efficiency's quality standards for investigations, which state that accurate processing of information is essential to the mission of an investigative organization and that this begins with the orderly, systematic, accurate, and secure maintenance of a management information system. However, based on our file review of a sample of 124 cases closed in fiscal year 2013, we found that DODIG investigators were not using the case management system for real-time case management. Specifically, we estimated that DODIG personnel uploaded key case documents to the system after DODIG had closed the case in 77 percent of cases in fiscal year 2013. Among other things, these documents included reports of investigation, oversight worksheets, and 180-day notification letters regarding delays in completing investigations. Additionally, we estimated that for 83 percent of cases closed in fiscal year 2013, DODIG staff had made changes to case variables in the case management system at least 3 months after case closure.

DODIG officials stated in 2015 that they planned to further develop a manual for the case management system that was in draft form along with internal desk aides, but that they did not plan to issue additional internal guidance for DODIG staff on the case management system because they believed that the existing guidance was sufficient. However, DODIG's draft manual did not instruct users on how to access the system, troubleshoot errors, or monitor caseloads. As a result, in our 2015 report we recommended that DOD issue additional guidance to investigators on how to use the case management system as a real-time management tool. DOD concurred with this recommendation and in March 2016 issued a case management system user guide and in July 2016, a data entry guide. Collectively, these guides provide users with key information on how to work with and maintain data in the case management system.

Case Management System  
Plan

In 2015, we found that each military service IG conducted and monitored the status of military whistleblower reprisal investigations in a different case management system and that DODIG did not have complete visibility over service investigations from complaint receipt to investigation determination. Further, we found that DODIG did not have knowledge of the real-time status of service-conducted investigations and was unable to anticipate when service IGs would send completed reports of investigation for DODIG review. DODIG is required to review all service IG determinations in military reprisal investigations in addition to its

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responsibility for conducting investigations of some military reprisal complaints, and DOD Directive 7050.06 requires that service IGs notify DODIG of reprisal complaints within 10 days of the receipt of a complaint. However, our analysis indicated that DODIG's case management system did not have records of at least 22 percent of service investigations both open as of September 30, 2014, and closed in fiscal years 2013 and 2014. Further, based on our file review, we estimated that there was no evidence of the required service notification in 30 percent of the cases closed in fiscal year 2013.<sup>19</sup> We concluded that without a common system to share data, DODIG's oversight of the timeliness of service investigations and visibility of its own future workload was limited.

At the time of our 2015 review, DOD was taking steps to improve its visibility into service investigations, including by expanding its case management system to the military services. DODIG officials stated that they had created a working group comprising representatives from each of the service IGs to facilitate the expansion and that they planned a complete rollout to the service IGs by the end of fiscal year 2016. However, DODIG did not have an implementation plan for the expansion and had not yet taken steps to develop one. Project management plans should include a scope—to describe major deliverables, assumptions, and project constraints—project requirements, schedules, costs, and stakeholder roles and responsibilities and communication techniques, among other things.<sup>20</sup> Given DOD's stated plans to expand the case management system to the service IGs by the end of fiscal year 2016, we recommended in our 2015 report that DOD develop an implementation plan that addresses the needs of DODIG and the service IGs and defines project goals, schedules, costs, stakeholder roles and responsibilities, and stakeholder communication techniques. DOD concurred with this recommendation and subsequently developed a plan in April 2016, in coordination with the military services, which included the elements we recommended for a plan to expand its case management system into an

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<sup>19</sup> This estimate has a margin of error of plus or minus 12 percentage points at the 95 percent confidence interval.

<sup>20</sup> Project Management Institute, Inc. *A Guide to the Project Management Body of Knowledge (PMBOK® Guide)*, Fifth Edition, 2013. The Project Management Institute's *Guide to Project Management Body of Knowledge (PMBOK® Guide)* provides guidelines for managing individual projects, including developing a project management plan defining the basis of work and how the project is executed, monitored and controlled, and closed. *PMBOK* is a trademark of Project Management Institute, Inc.

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enterprise system. This plan states that the enterprise case management system will launch between February 2018 and May 2018 and notes that the project budget between fiscal years 2017 and 2021 is approximately \$25.3 million.

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**Additional Actions Are Needed to Further Strengthen Oversight of Military Whistleblower Reprisal Investigations**

Although DODIG has taken several important actions, additional actions are still needed to further strengthen the capacity of DODIG and the Congress to oversee military whistleblower reprisal investigations. These actions include standardizing the investigation process and reporting corrective action information to Congress.

**Standardized Investigation Stages**

In 2015, we found that the DODIG and the military service IGs use different terms in their guidance to refer to their investigations, thus hindering DODIG's ability to consistently classify and assess the completeness of cases during its oversight reviews. For example, we found that in the absence of standardized investigation stages, DODIG investigators had miscoded approximately 43 percent of the cases that DODIG had closed in fiscal year 2013 as full investigations, based on our estimate, when these investigations were instead preliminary inquiries as indicated in the services' reports of investigation. The Council of the Inspectors General on Integrity and Efficiency's quality standards for investigations state that to facilitate due professional care, organizations should establish written investigative policies and procedures that are revised regularly according to evolving laws, regulations, and executive orders. DODIG took an important step to improve its guidance by issuing an updated reprisal investigation guide for military reprisal investigations for both DODIG and service IG investigators in October 2014.<sup>21</sup> However, the guide states that it describes best practices for conducting military reprisal intakes and investigations and DODIG officials told us that the guide does not explicitly direct the services to follow DODIG's preferred investigation process and stages. These officials further stated that they have no role in the development of service IG regulations.

To improve the military whistleblower reprisal investigation process and oversight of such investigations, in our 2015 report we recommended that

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<sup>21</sup> DODIG, *Guide to Investigating Military Whistleblower Reprisal and Restriction Complaints*. (Oct. 29, 2014).

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**Reporting on Corrective  
Actions**

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the Secretary of Defense in coordination with the DODIG, direct the military services to follow standardized investigation stages and issue guidance clarifying how the stages are defined. DOD concurred with this recommendation and subsequently updated its guide in June 2015. However, this guide is still characterized as describing best practices and does not direct the services to follow standardized investigation stages. We note that 10 U.S.C. § 1034 provides the authority for the Secretary of Defense to prescribe regulations to carry out the section. Also, DOD Directive 7050.06 assigns DODIG the responsibility to provide oversight of the military whistleblower reprisal program for the department. DODIG officials noted in August 2016 that they are currently working with the military services through an established working group to standardize the investigation stages as an interim measure. The DOD Principal Deputy Inspector General performing the duties of the DOD Inspector General also indicated in August 2016 that the office is willing to coordinate with the Secretary of Defense to issue authoritative direction to the services to standardize the investigation stages, but that this will take time.

As previously mentioned, we found in 2012 that DOD lacked reliable data on the corrective actions taken in response to substantiated whistleblower reprisal cases, thus limiting the visibility and oversight that DOD and Congress have of the final portion of the military whistleblower reprisal process. We also noted in 2012 that a 2009 Department of Justice review recommended that the results of investigations that substantiate allegations of reprisal be publicized as a way to heighten awareness within the services of the Military Whistleblower Protection Act, to potentially deter future incidents of reprisal, and to possibly encourage other reprisal victims to come forward. While the DODIG cannot directly take corrective action in response to a substantiated case per DOD Directive 7050.06, it is the focal point for DOD's military whistleblower reprisal program and is well positioned to collect and monitor data regarding program outcomes.<sup>22</sup> Further, DODIG officials stated in 2012 that because DODIG is the focal point, it is important for it to have visibility and information of all military whistleblower reprisal activities, not only to provide oversight but also to provide a central place within the

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<sup>22</sup> As previously mentioned in this statement, DOD Directive 7050.06 directs the Secretaries of the military departments and the heads of the other DOD components to take corrective action based on IG reports of investigations of military whistleblower reprisal allegations.

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department where internal and external stakeholders can obtain information.

In addition to the recommendations we made regarding establishing corrective action reporting requirements and regularly tracking these data, we also recommended in our 2012 report that DOD regularly report to Congress on the frequency and type of corrective actions taken in response to substantiated reprisal claims. We noted that DOD could do so, for example, through its semiannual reports to Congress. DOD concurred with that recommendation and has since included examples in its semiannual reports to Congress of corrective actions taken by the military services for substantiated cases but not a comprehensive list of all corrective actions taken. However, in following up on actions that DODIG has taken regarding this recommendation in August 2016, DODIG officials stated that the corrective actions listed in its semiannual reports to Congress included all corrective actions taken during the 6 month reporting period, but that the reports incorrectly identified these actions as examples. DODIG provided us corrective action information to compare with the corrective actions reported in DODIG's December 2015 and March 2016 semiannual reports to Congress for those reporting periods. We identified some key differences. Specifically, we identified corrective actions in the information provided to us by DODIG that were not published in the December and March reports to Congress and identified discrepancies in the types of corrective action contained in the reports and in the information that DODIG provided. As a result, we believe that DODIG's two most recent semiannual reports to Congress did not include the frequency and type of all corrective actions reported during those reporting periods.

Relatedly, we also noted in August 2016 that DODIG's semiannual reports did not include other information needed to convey the frequency and type of corrective actions. Specifically, DODIG officials stated in August 2016 that their case management system would require additional capability in order to produce a list of substantiated allegations that do not have associated corrective actions, which would indicate which corrective action recommendations are outstanding. Further, these officials stated that publishing information showing the status of all DODIG corrective action recommendations—not just actions that were taken during a particular reporting period—could be misleading because the military services sometimes take actions that are different than those recommended by DODIG and that may not result from reprisal investigations. However, as noted in the 2009 Department of Justice review, publicizing the results of investigations that substantiate



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allegations of reprisal may help to deter future incidents of reprisal and encourage other whistleblowers to come forward. Without including information on (1) all corrective actions taken during a reporting period, (2) outstanding corrective action recommendations, and (3) actions taken by the services that are different than those recommended by DODIG, we believe that DODIG's current method of reporting does not fully address our recommendation to report to Congress on the frequency and type of corrective action taken in response to substantiated claims. Moreover, it does not meet the requirement to keep Congress fully and currently informed on the progress of implementing corrective actions through, among other things, its semiannual reports to Congress. We therefore continue to believe that without such information, Congress will be hindered in its ability to provide oversight of the corrective action portion of the military whistleblower reprisal program.

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In summary, DOD has taken actions to implement 15 of the 18 recommendations that we made to address the military whistleblower reprisal timeliness and oversight challenges we identified in our 2012 and 2015 reports. These efforts constitute progress toward improving the DODIG's ability to accurately track the timeliness of military whistleblower reprisal investigations and increase the DODIG's ability to effectively oversee the department's military whistleblower reprisal program. Fully implementing the remaining 3 recommendations would further strengthen DODIG's capacity to assess the quality of military whistleblower reprisal investigations and enhance Congress' visibility into the timeliness of investigations as well as into the corrective actions taken for substantiated allegations. We have ongoing work that will help to both monitor the actions taken by DODIG to improve its oversight of military reprisal investigations and provide additional insight on the DODIG's ability to conduct timely and quality reprisal investigations for DOD's civilian and contractor employees.

Chairman DeSantis, Ranking Member Lynch, and Members of the Subcommittee, this concludes my prepared statement. I look forward to answering any questions that you might have.

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**GAO Contact and  
Staff  
Acknowledgments**

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Mr. DESANTIS. Thank you.

The chair now recognizes Ms. Smithberger for 5 minutes.

#### **TESTIMONY OF MANDY SMITHBERGER**

Ms. SMITHBERGER. Thank you, Chairman DeSantis and Ranking Member Lynch for inviting me here today. The Project on Government Oversight was founded by Pentagon whistleblowers concerned about overpriced and ineffective weapons. From our founding, we've been concerned about protecting military, civilian, intelligence, and contractor whistleblowers.

The Department of Defense Inspector General is supposed to work with and protect whistleblowers, but a number of reports, including the GAO report issued last year, raised serious concerns. POGO has also heard directly from whistleblowers within DOD IG. To hear from whistleblowers from an IG shop is rare, and to hear from so many is unprecedented. An attorney who represents several of them would be happy to meet with the committee if you'd like more information.

The concerns of these whistleblowers are echoed in OPM survey data. That data shows that a quarter of DOD IG employees said they felt that they could not disclose a suspected violation of law, rule, or regulation without fear of reprisal. Nearly half said they didn't think their leadership maintains high standards of honesty and integrity. This is double the rate reported by DOD employees. DOD IG should be a model agency, and this kind of survey data raises serious concerns.

In March, we sent a letter to Principal Deputy IG Glenn Fine raising concerns about timeliness of investigations, a toxic culture towards whistleblowers, and insufficient transparency for military reprisal investigations. Our letter raised concerns that managers in the IG's administrative investigations division, who conduct reprisal investigations across the Department, had backfilled case files to try to mislead GAO investigators. We've also raised concerns about DOD IG's rate of dismissal. DOD IG dismissed without full investigation 86 percent of the military whistleblower cases it received in the past 4 years. We were surprised that this rate was more than double that for the service IGs who are traditionally considered to be less independent.

DOD IG substantiated only 1 percent of the cases during this period. Frankly, things are bad for most whistleblowers who come to DOD IG. DOD IG substantiated only 7 out of over 1,300 complaints received from civilians and contractors.

Those rates are about half of what we have seen for Federal employee whistleblowers at the Office of Special Counsel. Low investigation and low substantiation rates create the appearance the Office is focused on closing rather than investigating the cases it receives.

The high dismissal rates may be in part due to changes by DOD IG to reduce cycle time by automatically closing cases within 10 days if whistleblowers do not provide additional information. While we agree with the committee that timeliness is important, we worry this timeline is too short since servicemembers may be deployed, disabled, or otherwise limited in their ability to access documents in a timely manner. Striking the balance between timeli-

ness and quality is extremely difficult, and we appreciate that, but both must be a focus of this committee's oversight.

We are also concerned DOD IG is not consistently talking to whistleblowers before dismissing cases in violation of their own procedures. Talking to whistleblowers not only helps that investigation but it also prevents DOD IG from unknowingly exposing whistleblowers to additional retaliation by referring their complaints back to the entities that they were initially reporting on.

We are also concerned about whether whistleblower laws are consistently and fairly applied. A 2011 internal review found that DOD IG's own investigators disagreed about the decision to dismiss a case 68 percent of the time. Investigators disagreed with each other on substantiating cases 47 percent of the time.

The GAO's review mentioned other problems as well with the case management system, specifically finding that key case documents were submitted after cases were closed for 77 percent of the cases closed in 2013 and that key case variables like dates and results to show whether a case was fully investigated were changed in 83 percent of the cases in fiscal year 2014.

The problems may be even worse than those found by GAO since DOD IG managers told investigators to stand down on other work to backfill cases. Internal emails shared with POGO showed that managers instructed investigators to work on or amend older information that was the focus of the GAO review and raises concerns about those managers since changing these records likely has significant impact on the GAO's findings.

Separately and in the broader picture, POGO is most troubled by the role of IG General Counsel Henry Shelley. Since sending our letter in March, OSC has found there is a substantial likelihood of truth to allegations the IG improperly destroyed files in a major whistleblower case. These allegations are now being investigated by the Inspector General at the Department of Justice. This is only the latest of various allegations that have come to public attention, that Mr. Fine's top legal advisor engages in a systemic practice of improperly interfering with and undermining personnel investigations.

For example, a POGO investigation found that as—a top legal advisor to one of Mr. Fine's predecessors, Mr. Shelley helped direct a process that permanently suppressed the findings of a team of IG investigators regarding top officials of the Department of Defense, including the Secretary of Defense.

In my written testimony, I've included a list of recommendations that POGO believes would enhance and strengthen military whistleblower protections, which I will be happy to discuss during Q and A.

Whistleblowers who report concerns that affect our national security must be lauded, not shunned or, worse, harmed, and the law must protect them. The perceived and real failures of the DOD IG to act as a check on violations of law should be of grave concern. Thank you.

[Prepared statement of Ms. Smithberger follows:]



**Testimony of Mandy Smithberger, Director of the Straus Military Reform Project at the  
Center for Defense Information  
Project On Government Oversight  
before the  
House Oversight and Government Reform  
Subcommittee on National Security  
on  
“Oversight of the Department of Defense Office of Inspector General’s Military  
Whistleblower Reprisal Investigations”**

**September 7, 2016**

Chairman DeSantis and Ranking Member Lynch, thank you for inviting me to testify today and for your oversight efforts to ensure proper implementation of whistleblower protections. I am Mandy Smithberger, the Director of the Straus Military Reform Project, a program of the Project On Government Oversight (POGO). Thirty-five years ago, POGO was founded by Pentagon whistleblowers who were concerned about the Department’s procurement of ineffective and overpriced weapons. Throughout our history we have promoted improvements to better protect military, civilian, intelligence, and contractor whistleblowers.

The Department of Defense Office of the Inspector General (DoD IG) was intended to be an office that would work with and protect those whistleblowers. However, for years independent evaluations of the DoD IG, including a report on the Administrative Investigation division’s military reprisal investigations issued by the Government Accountability Office (GAO) last year, have raised serious concerns about the office’s capacity and willingness to provide independent oversight of the Department’s treatment of whistleblowers.<sup>1</sup>

POGO has also heard directly from whistleblowers within DoD IG who have expressed serious concerns about the integrity of the office’s processes and investigations, including pressure to back-fill whistleblower case files for the GAO’s review. It is extremely rare to have whistleblowers from an IG shop come forward, but in this case we have a number of them. Concerns raised by individual whistleblowers are also echoed in OPM Survey data, which

<sup>1</sup> Department of Defense Inspector General, *2002 Military Reprisal Investigation Study*, <https://www.documentcloud.org/documents/2746545-OIG-Assessment.html>; Department of Justice Inspector General, *A Review of the Department of Defense Office of Inspector General’s Process for Handling Military Whistleblower Reprisal Allegations*, July 2009, <http://www.pogoarchives.org/m/go/dod-ig-report-20090701.pdf>; Department of Defense Inspector General, *Review of Office of Deputy Inspector General for Administrative Investigations*, Directorate for Military Reprisal Investigations, May 16, 2011, <http://www.pogo.org/documents/2011/dod-ig-mri-review-2011.html>; Government Accountability Office, *Whistleblower Protection: Actions Needed to Improve DOD’s Military Whistleblower Reprisal Program*, February 2012, <http://www.gao.gov/assets/590/588784.pdf>; Government Accountability Office, *Whistleblower Protection: DOD Needs to Enhance Oversight of Military Whistleblower Reprisal*, May 7, 2015, <http://www.gao.gov/assets/680/670067.pdf>





showed that 26.5 percent of DoD IG employees surveyed responded that they did not feel they could “disclose a suspected violation of any law, rule, or regulation without fear of reprisal.”<sup>2</sup> Forty-five percent of DoD IG employees also disagreed that their senior leadership maintains high standards of honesty and integrity—nearly twice the rate reported by employees at the Department of Defense.<sup>3</sup> Alleged retaliation by DoD IG’s General Counsel against the agency’s former Assistant Inspector General and the former Director of Whistleblowing and Transparency only raises additional concerns about the perilous environment for whistleblowers.<sup>4</sup> We believe this reflects deep cultural problems that must be remedied in order for whistleblowers to believe this office should be trusted as willing and able to protect whistleblowers and to hold accountable those who illegally retaliate against them.

POGO raised concerns about the integrity of military reprisal investigations, timeliness, toxic culture, and transparency in a letter to Principal Deputy IG Glenn Fine in March.<sup>5</sup> We are glad that, since sending that letter, the DoD IG has revised its policies to include proactive release of substantiated reports of misconduct, a policy previously championed on the full Committee by Chairman Chaffetz and Representative Speier, and we hope other IGs will adopt the same policy.<sup>6</sup> But we remain concerned about the deeper cultural problems that remain.

Ensuring the fairness of military reprisal investigations is particularly important because military whistleblowers still have a higher burden of proof to show illegal retaliation than other federal whistleblowers. In the military, the burden is placed on our service members to prove that they were illegally retaliated against, versus in civilian cases where the burden is placed on the agency to prove there was no retaliation. We believe this is one contributing factor to low substantiation rates for military whistleblower reprisal cases. The House’s version of the National Defense Authorization Act includes a bipartisan provision to update these burdens, and we hope this Committee will support including this provision in the final legislation now in conference.<sup>7</sup>

Fixing these deep cultural problems will require more than the tweaks to policies and training sessions the DoD IG has instituted thus far. It must include changes in leadership in the offices of General Counsel and Administrative Investigations. Congress’s leadership on these issues has been essential. I want to thank Chairman DeSantis and Ranking Member Lynch for cosponsoring

<sup>2</sup> Office of Personnel Management, Federal Employee Viewpoint Survey Results of DoD IG for 2015, p. 4.

<sup>3</sup> Ibid, p. 12.

<sup>4</sup> Marisa Taylor, “Is whistleblower advocate for nation’s spies under attack?” *McClatchy*, April 2, 2014. <http://www.mcclatchydc.com/news/nation-world/national/national-security/article24766012.html>; Charles S. Clark, “Intel Community Whistleblower Chief Fighting Old Pentagon Bosses,” *Government Executive*, July 27, 2016. <http://www.govexec.com/defense/2016/07/intel-community-whistleblower-chief-fighting-old-pentagon-bosses/130274/>; Charles S. Clark, “Fired Pentagon Whistleblower Goes Public in Attack on IG’s Office,” *Government Executive*, May 23, 2016. <http://www.govexec.com/defense/2016/05/fired-pentagon-whistleblower-goes-public-attack-igs-office/128511/>

<sup>5</sup> “Letter to Pentagon Watchdog to Address Internal Misconduct Regarding Military Whistleblower Reprisal Investigations,” March 16, 2016. <http://www.pogo.org/our-work/letters/2016/letter-to-pentagon-watchdog.html>

<sup>6</sup> Department of Defense Office of Inspector General, “DoD IG Monthly Update - June 2016.” [http://www.dodig.mil/eletter/eletter\\_view.cfm?id=6975](http://www.dodig.mil/eletter/eletter_view.cfm?id=6975); House Oversight and Government Reform Committee, “Full Committee Business Meeting – September 17,” September 17, 2014. <https://oversight.house.gov/markup/full-committee-business-meeting-17/>

<sup>7</sup> House, National Defense Authorization Act for Fiscal Year 2017, (H.R. 4909), Sec. 545, Introduced by Representative Mac Thornberry.

legislation to protect whistleblowers at the Veterans Administration and contractors throughout the federal government, respectively. And we are encouraged to see that Chairman Chaffetz and Ranking Member Cummings, along with Senators Grassley, McCaskill, and Gillibrand, are continuing to pursue concerns about the DoD IG's reprisal investigations.<sup>8</sup>

### Questionable Outcomes for Whistleblowers

POGO is concerned because the DoD IG has dismissed without full investigation 86 percent of the military cases it has received since pledging to make reforms in 2011.<sup>9</sup> The IG's rate of dismissal is particularly striking because it is more than double that of Service IGs, who many consider to be less independent. For purposes of comparison, during the same time period the DoD IG dismissed an even higher percentage of civilian and contractor reprisal cases, substantiating only 7 out of over 1,300 complaints received. And for another comparison, the DoD IG's investigative rates for civilian reprisals are about half of what we have seen for federal employee whistleblowers at the Office of Special Counsel.<sup>10</sup> The DoD IG's low investigation and substantiation rates create the appearance that the office is focused on closing, rather than investigating, the cases it receives.

POGO worries that one reason the rate of dismissals without full investigation is so high for military cases is that, following the 2012 GAO report, the DoD IG adopted a practice to "reduce cycle time" by automatically closing cases within 10 days if the complainant failed to provide additional information.<sup>11</sup> While we appreciate the need to keep cases moving, we worry that this short of a timeline, or any other practice that seeks to close otherwise viable claims of retaliation by military service members, may infringe upon the whistleblowers' due process rights and may fail to uphold the intent of the law. Service members may be deployed, disabled, or otherwise hindered from providing supporting documentation in the 10-day requirement, and therefore lose their chance at a fair investigation of their claims.

<sup>8</sup> Letter from Representative Jason Chaffetz, Representative Elijah Cummings, Senator Charles Grassley, Senator Kirsten Gillibrand, and Senator Claire McCaskill, to Acting Inspector General Glenn Fine, about military reprisal investigations, June 10, 2016. [http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20OIG%20\(Whistleblower%20Reprisal%20Investigations\)%20\(003\).pdf](http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20OIG%20(Whistleblower%20Reprisal%20Investigations)%20(003).pdf)

<sup>9</sup> "Testimony of Marguerite C. Garrison, Deputy Inspector General for Administrative Investigations, Department of Defense, before the Subcommittee on Contracting Oversight," December 6, 2011, p. 37. <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg72560/pdf/CHRG-112shrg72560.pdf>; See Appendix A to this Testimony

<sup>10</sup> Between FY 2012 and FY 2015 the Office of Special Counsel processed and closed 12,852 complaints and referred 1,045 to be investigated by the Investigation and Prosecution Division (IPD). During the same time period DoD OIG processed and closed 874 civilian reprisal cases and investigated 35. This example isn't perfectly analogous since the Office of Special Counsel's Complaints Examining Unit and Alternative Dispute Resolution Unit can also get resolution for prohibited personnel practices, and this referral rate includes all prohibited personnel practices, not just whistleblower retaliation claims. Office of Special Counsel, *Annual Report to Congress for Fiscal Year 2015*, p. 17. <https://osc.gov/Resources/FINAL-FY-2015-Annual-Report.pdf>; Appendix A.

<sup>11</sup> Department of Defense Inspector General, *Semiannual Report to the Congress: April 1, 2012 – September 30, 2012*, p. 54. [http://www.dodig.mil/sar/SAR\\_OCT\\_2012\\_web.pdf](http://www.dodig.mil/sar/SAR_OCT_2012_web.pdf)

We also share the concerns of the oversight committees of jurisdiction that the DoD IG may be dismissing or closing reprisal cases without talking to the whistleblower first.<sup>12</sup> In POGO's experience, whistleblowers are rarely savvy enough about the whistleblower process to know what information they must include in their initial claim to open an investigation. While these conversations can take some time, we have found that talking to whistleblowers is essential in making determinations about which cases should be pursued.

Failing to talk to whistleblowers may also be contributing to whistleblowers feeling betrayed by the DoD IG. POGO has found several instances in which the DoD IG referred whistleblower disclosures back to entities that are not sufficiently independent to conduct the investigation. In some of those instances whistleblowers felt the IG needlessly exposed them to additional retaliation, and had they known the IG was going to refer their disclosures they would have chosen to withdraw their complaints. We believe this is yet another problem that could be easily resolved by the DoD IG consistently talking to whistleblowers, and by changing the law to allow whistleblowers to choose whether an allegation deemed worth investigating should be pursued by a service, component, or DoD IG.

Finally, the GAO review and reviews conducted by others have raised concerns about whether investigative processes are consistently and properly followed. For example, POGO and Congress found several instances in which the DoD IG interpreted protections for contractor whistleblowers too narrowly.<sup>13</sup> The IG has been responsive, and revisited those cases once those errors were pointed out to them, but we cannot have an IG system that requires outside intervention to reopen cases or intervene into the investigative process to ensure whistleblower protections are appropriately applied.<sup>14</sup>

We are also increasingly concerned about the implementation of existing contractor whistleblower protections. It appears significant delays by DoD and the National Aeronautics and Space Administration (NASA) in implementing regulations has left contractors without protections intended by Congress.

A 2011 Internal Review Team report questioned substantiation rates, disagreeing with the DoD IG's own decisions in 47 percent of the cases they reviewed. In those instances in which the DoD

<sup>12</sup> Letter from Representative Jason Chaffetz, Representative Elijah Cummings, Senator Charles Grassley, Senator Kirsten Gillibrand, and Senator Claire McCaskill, to Acting Inspector General Glenn Fine, about military reprisal investigations, June 10, 2016, p. 5. [http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20OIG%20\(Whistleblower%20Reprisal%20Investigations\)%20\(003\).pdf](http://www.grassley.senate.gov/sites/default/files/constituents/2016-06-10%20CEG%20et%20al%20to%20DOD%20OIG%20(Whistleblower%20Reprisal%20Investigations)%20(003).pdf)

<sup>13</sup> Project On Government Oversight letter to DoD Inspector General Jon T. Rymer, "POGO Urges Department of Defense IG to Broaden Its Interpretation of Contractor Whistleblower Protection Law," May 20, 2014. <http://www.pogo.org/our-work/letters/2014/pogo-urges-dept-of-defense-ig-to-broaden-whistleblower-protection-law.html>; Tony Messenger, "Messenger: Fired Guard employee is vindicated with U.S. Senate inquiry," *St. Louis Post-Dispatch*, February 29, 2016. [http://www.stltoday.com/news/local/columns/tony-messenger/messenger-fired-guard-employee-is-vindicated-with-u-s-senate/article\\_e6ecc02e-3c03-504e-9c4e-f238564b7cfe.html](http://www.stltoday.com/news/local/columns/tony-messenger/messenger-fired-guard-employee-is-vindicated-with-u-s-senate/article_e6ecc02e-3c03-504e-9c4e-f238564b7cfe.html)

<sup>14</sup> Scott Amey, "DoD IG Pledges to Better Protect Contractor Whistleblowers," October 30, 2014. <http://www.pogo.org/blog/2014/10/dod-ig-pledges-to-better-protect-contractor-whistleblowers.html>; Tony Messenger, "Messenger: Inspector General agrees to reopen case of fired Missouri Guard whistleblower," *St. Louis Post-Dispatch*, April 19, 2016. [http://www.stltoday.com/news/local/columns/tony-messenger/messenger-inspector-general-agrees-to-reopen-case-of-fired-missouri/article\\_ebe033f7-e5d4-5889-93eb-d20024ae76d7.html](http://www.stltoday.com/news/local/columns/tony-messenger/messenger-inspector-general-agrees-to-reopen-case-of-fired-missouri/article_ebe033f7-e5d4-5889-93eb-d20024ae76d7.html)

IG declined to investigate, the reviewers disagreed 68 percent of the time.<sup>15</sup> In a positive step forward, the DoD IG has implemented a number of reforms since then. We recommend that either GAO investigators or an outside IG conduct another peer review to see if those reforms have resulted in more consistent application of whistleblower laws.

#### **Misconduct within the DoD IG**

One of the major issues raised by the GAO review was problems with the DoD IG's case management system. Specifically, the GAO found that the IG uploaded key case documents after it had closed the case in 77 percent of cases closed in fiscal year 2013, and altered case variables for 83 percent of cases closed in fiscal year 2014. Case variables that were changed after the fact included information used to evaluate timeliness of investigations and investigative outcomes, including "changes to the date the service member filed the complaint and the organization that conducted the investigation, as well as the result code, which indicates whether the case was fully investigated."<sup>16</sup>

Case files were such a mess that IG management instructed investigators to "stand down" on other work in September 2013 in order to add additional records to closed cases in the case management system. Emails shared with POGO said personnel could also apply for overtime to work on or amend the information in their own and others' old cases. Internal instructions by DoD IG management to staff that were shared with POGO provide evidence of efforts to improperly influence the GAO's findings, including advising staff to add information to files that were specifically within the scope of the GAO's review. Management's instructions raise serious concerns about those DoD IG officials and the cases processed by the Administrative and Whistleblower Reprisal Investigations teams, since changing these records likely had a significant impact on the GAO's findings. We are concerned that the DoD IG has only seen this as a compliance exercise and does not understand the gravity of trying to mislead GAO investigators.

Since sending our letter, additional whistleblower allegations that IG General Counsel Henry Shelley improperly destroyed files in a whistleblower case have been referred to the DoD IG by the Office of Special Counsel for investigation. Principal Deputy IG Fine in turn referred the allegations to the Department of Justice Inspector General for an independent investigation, and we applaud him for doing so.<sup>17</sup> But we are troubled because this is only the latest allegation of many that Shelley engages in a systemic practice of improperly interfering with and undermining personnel investigations. In 2008 we raised concerns about Shelley's efforts to overturn substantiated findings of anti-Semitism against an Army Engineer at the behest of the Army, and raised concerns again last year about his unusually active role in watering down findings that

<sup>15</sup> Department of Defense Inspector General, *Review of Office of Deputy Inspector General for Administrative Investigations, Directorate for Military Reprisal Investigations*, May 16, 2011, Executive Summary. <http://www.pogo.org/documents/2011/dod-ig-mri-review-2011.html>

<sup>16</sup> *Whistleblower Protection: DOD Needs to Enhance Oversight of Military Whistleblower Reprisal*, 2015, pp. 23-25.

<sup>17</sup> Charles S. Clark, "Pentagon Watchdog Officials Now Under Justice Department Probe," *Government Executive*, March 22, 2016. <http://www.govexec.com/defense/2016/03/pentagon-watchdog-officials-now-under-justice-department-probe/126859/>

then-Secretary of Defense Leon Panetta improperly provided classified information to *Zero Dark Thirty* filmmakers.<sup>18</sup>

### Problem of Acting IGs

POGO views IGs as an essential component of a well-functioning federal government, and over the past few years we have undertaken a number of efforts to study and improve the IG system. One of those efforts is to draw attention to the large number of IG offices that are operating without permanent leadership.<sup>19</sup> POGO firmly believes that the effectiveness of an IG office can be diminished when that office does not have permanent leadership, especially when the vacancy exists for an extended period of time, as many of the current vacancies have.

In addition, a permanent IG has the ability to set a long-term strategic plan for the office, including setting investigative and audit priorities. An acting official, on the other hand, is known by all OIG staff to be temporary, which one former IG has argued “can have a debilitating effect on [an] OIG, particularly over a lengthy period.”<sup>20</sup>

While the DoD IG does not hold the record for the longest vacancy, we believe that filling this position should be a priority for the next administration. Addressing the DoD IG’s deep cultural problems—all of which predate Principal Deputy IG Fine—requires permanent leadership.

### Recommendations

The DoD IG should:

- Investigate and consider for removal any senior officials found to have illegally destroyed evidence in whistleblower or other case files, improperly instructed employees to back-fill cases, or otherwise interfered with the independence and integrity of investigations;
- Develop and follow uniform procedures for conducting civilian, intelligence, contractor, and military whistleblower reprisal investigations, including training for soliciting pertinent evidence;
- Request a GAO or outside IG audit of the DoD IG’s reprisal investigations to ensure that investigators’ decisions to dismiss, investigate, and substantiate reprisal are proper and based on the legal requirements for examining any evidence presented;

<sup>18</sup> Project On Government Oversight Letter to Congress, “POGO letter to members of Congress regarding the DOD Inspector General,” May 1, 2008. <http://www.pogo.org/our-work/letters/2008/go-igi-20080501.html>; Adam Zagorin, “Exclusive: New Documents in Zero Dark Thirty Affair Raise Questions of White House-Sanctioned Intelligence Leak and Inspector General Coverup,” April 16, 2015. <http://www.pogo.org/our-work/articles/2015/new-documents-in-zero-dark-thirty-affair-raise-questions.html>; Marisa Taylor, “Official who oversees whistleblower complaints files one of his own,” *McClatchy*, July 26, 2016. <http://www.mcclatchydc.com/news/national-world/national/national-security/article91949562.html>

<sup>19</sup> Project On Government Oversight, “Where Are All the Watchdogs?” <http://www.pogo.org/tools-and-data/ig-watchdogs/go-igi-20120208-where-are-all-the-watchdogs-inspector-general-vacancies1.html>

<sup>20</sup> Government Accountability Office, *Inspectors General: Limitations of IG Oversight at the Department of State*, October 31, 2007, p. 8. <http://www.gao.gov/assets/120/118417.pdf>

- Make sure investigators and reviewers are maintaining case files in real time to make sure its data is reliable on an ongoing basis;
- Whenever possible inform complainants whether their cases are still active, and consistently follow the law to notify complainants whose cases go beyond 180 days why the deadline will not be met and accurately report the estimated completed date in a timely manner;
- Report to Congress about the timeliness of investigations;
- Consistently include in its semiannual reports instances when DoD or its components declined to take the DoD OIG's recommended actions;
- As practicable, make sure investigators do not dismiss reprisal cases without interviewing complainants;
- Ensure it does not refer cases back to the offices named by the whistleblower without their consent.

### **Conclusion**

Whistleblowers who report concerns that affect our national security must be lauded, not shunned or, worse, harmed. And the law must protect them. The perceived and real failures of the DoD IG to act as a check on violations of law should be of grave concern. It is POGO's hope that Congress and the DoD IG will ensure that whistleblowers can successfully step forward to expose and stop wrongdoing, and be confident that they will not suffer retaliation as a result.

Table created by the Project On Government Oversight for the House Oversight and Government Reform Subcommittee on National Security  
hearing on "Oversight of the Department of Defense Office of Inspector General's Military Whistleblower Reprisal Investigations,"  
September 7, 2016

#### Appendix A

##### Military Reprisal Investigations

	Sep-12 <sup>1</sup>	Mar-13	Sep-13	Mar-14	Sep-14	Mar-15	Sep-15	Mar-16	Totals
Military Reprisal Closed by DoD IG	81	65	92	112	120	87	100	134	791
Military Reprisal Closed by Service IGs	198	83	183	168	239	298	213	234	1616
Military Reprisal Dismissed by DoD IG	68	58	76	104	95	74	81	110	680
Military Reprisal Dismissed by Service IGs	99	35	83	59	67	128	76	103	650
Military Reprisal Investigated by DoD IG	13	7	8	7	14	7	7	2	65
Military Reprisal Investigated by Service IGs	99	39	100	97	143	152	114	112	856
Military Reprisal Substantiated by DoD IG	2	1	1	0	1	0	2	0	7
Military Reprisal Substantiated by Service IGs	18	2	9	9	17	12	17	11	95
<b>% DoD IG Dismissed Cases</b>	<b>84.0%</b>	<b>89.2%</b>	<b>82.6%</b>	<b>92.9%</b>	<b>79.2%</b>	<b>85.1%</b>	<b>81.0%</b>	<b>82.1%</b>	<b>86.0%</b>
<b>% Service IG Dismissed Cases</b>	<b>50.0%</b>	<b>42.2%</b>	<b>45.4%</b>	<b>35.1%</b>	<b>28.0%</b>	<b>43.0%</b>	<b>35.7%</b>	<b>44.0%</b>	<b>40.2%</b>
<b>% DoD IG Investigated Cases</b>	<b>16.0%</b>	<b>10.8%</b>	<b>8.7%</b>	<b>6.3%</b>	<b>11.7%</b>	<b>8.0%</b>	<b>7.0%</b>	<b>1.5%</b>	<b>8.2%</b>
<b>% Service IG Investigated Cases</b>	<b>50.0%</b>	<b>47.0%</b>	<b>54.6%</b>	<b>57.7%</b>	<b>59.8%</b>	<b>51.0%</b>	<b>53.5%</b>	<b>47.9%</b>	<b>53.0%</b>
<b>% DoD IG Substantiated from Total</b>	<b>2.5%</b>	<b>1.5%</b>	<b>1.1%</b>	<b>0.0%</b>	<b>0.8%</b>	<b>0.0%</b>	<b>2.0%</b>	<b>0.0%</b>	<b>0.9%</b>
<b>% Service IG Substantiated from Total</b>	<b>9.1%</b>	<b>2.4%</b>	<b>4.9%</b>	<b>5.4%</b>	<b>7.1%</b>	<b>4.0%</b>	<b>8.0%</b>	<b>4.7%</b>	<b>5.9%</b>

**Sources for all Appendix A tables:** Department of Defense Inspector General, *Semiannual Report to the Congress: April 1, 2012 – September 30, 2012*, p. 56.  
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<sup>1</sup> Dates indicate end of reporting period

Table created by the Project On Government Oversight for the House Oversight and Government Reform Subcommittee on National Security  
hearing on "Oversight of the Department of Defense Office of Inspector General's Military Whistleblower Reprisal Investigations,"  
September 7, 2016

**Civilian Reprisal Investigations**

	Sep-12	Mar-13	Sep-13	Mar-14	Sep-14	Mar-15	Sep-15	Mar-16	Totals
Civilian Reprisal Closed by DoD IG	113	47	99	105	149	112	128	121	874
Civilian Reprisal Dismissed by DoD IG	104	43	90	100	144	106	125	121	833
Civilian Reprisal Investigated by DoD IG	7	3	8	4	5	6	2	0	35
Civilian Reprisal Substantiated by DoD IG	0	0	1	2	1	2	0	0	6
<b>% DoD IG Dismissed Cases</b>	92%	91.5%	90.9%	95.2%	96.6%	94.6%	97.7%	100%	95.3%
<b>% DoD IG Investigated Cases</b>	6.2%	6.4%	8.1%	3.8%	3.4%	5.4%	1.6%	0%	4%
<b>% DoD IG Substantiated from Total</b>	0%	0%	1%	1.9%	0.7%	1.8%	0%	0%	0.7%

**Contractor Reprisal Investigations**

	Sep-12	Mar-13	Sep-13	Mar-14	Sep-14	Mar-15	Sep-15	Mar-16	Totals
Contractor Reprisal Closed by DoD IG	64	53	54	53	83	52	59	69	487
Contractor Reprisal Dismissed by DoD IG	59	49	51	45	72	49	47	58	430
Contractor Reprisal Investigated by DoD IG	5	3	3	4	7	2	5	5	34
Contractor Reprisal Substantiated by DoD IG	0	0	0	0	1	0	0	0	1
<b>% DoD IG Dismissed Cases</b>	92.2%	92.5%	94.4%	84.9%	86.8%	94.23%	79.7%	84.1%	88.3%
<b>% DoD IG Investigated Cases</b>	7.8%	5.7%	5.6%	7.6%	8.4%	3.85%	8.5%	7.3%	7%
<b>% DoD IG Substantiated from Total</b>	0%	0%	0%	0%	1.2%	0.00%	0%	0%	0.2%



Mr. DESANTIS. Thank you.

The chair now recognizes himself for 5 minutes.

So, Mr. Fine, there's statements made here that there's

so many of these cases, very few of them are substantiated. I think the implicit criticism perhaps from our witness here is that you guys just aren't doing your job, that there are these cases that are just not been substantiated. And that may be the case, but I also look at it and say: Well, maybe those ones that are dismissed are being dismissed properly and that we have an awful lot of people that are filing these that can't be substantiated.

So how would you respond to the ratio issue that you get a lot of complaints, you don't substantiate very many?

Mr. FINE. Well, that's a very good question, and I appreciate the opportunity to answer that question. First, with regard to the data. I don't think the data is really accurate, because when you talk about 86 percent being substantiated, POGO includes in that the amount that we were referring to the services for them to investigate, so not 86 percent are not dismissed. A big portion of them are referred for investigation.

As I said in my statement, our job is to take the facts wherever they lead, and if it is substantiated in our view, we should do that, and if it's not, we shouldn't. And we are going to get criticized from both sides. You're too hard, you're too soft. You're doing a white-wash, you're doing a witch hunt, you're a junkyard dog, you're a lapdog. You get that often in the same case.

We can't let that deter us. We have to look at the evidence and look at the facts, and we take each case on its merits and we try and follow them through.

It is a challenging task. It is a challenging task to determine if there really was retaliation or whether it was an unfair allegation of reprisal. And we look for the evidence and we take it where it leads. That's our job, and that's what I try to describe how we're trying to improve our processes.

Mr. DESANTIS. And part of the reason why you may get criticism from both sides is because this process of substantiation, there's a lot of subjectivity to that. Commander Zinke was very critical of the report involving Rear Admiral Losey. I have—I have read those reports. I have not read some of the other cases that have been cited here, but I will say that it struck me, looking at Losey's case, that you had the Navy investigated, they said that there was, you know, legitimate command reasons to take some of these decisions, that DOD IG obviously came to different conclusions in some of the findings. The chief of naval operations took all that into consideration and said that while he should not have been complaining about the initial false report, you know, his actions were justified.

And I guess my question is, is with the level of subjectivity, as I read the report for DOD on Losey, for example, I mean, there were certain decisions that were made that were very much just reading it in a light that was probably least favorable to him.

I mean, for example—and I'm not going to name the complainants, but one of the complainants testified that Losey told him that he did not suspect him of being the original whistleblower. When Losey testified, he said he did not suspect the complainant from being the original whistleblower, but the complainant said: Well,

his body language suggested that I was—that he thought I was it, and the IG basically concluded that he was—that that was one of the reasons why he was being found.

There's another issue of about one of the admin officers was given not the highest but the second highest grade in terms of his evaluation, and the IG report was critical of the commander for not doing an improvement plan. But a lot of people I've talked to in Defense, they would say that that's too high a rating to necessitate an improvement plan.

So I guess the question is, is how do you ensure objectivity and a consistent standard when you're determining what is substantiated and what is not?

Mr. FINE. Well, you look at the standard and you apply that standard to the facts, and you don't rely on one piece of evidence, whether it's body language. We do report what people say, but that's not the significant piece of evidence that would conclude us—that would allow us to conclude that there was retaliation. We look at all the evidence. We put it in the report so that people can make their own judgments.

We did look at all the evidence in this case. It was a case before my time, but I looked at it, and it seemed a pretty strong case to me, including the language that Admiral Losey had repeatedly speculated on who made the complaint against him, focusing on the complainants and a few others, asking his staff to find out who made the complaint, and then saying he would find out why they did this and cut the head off the snake and end it. And that's what the evidence indicated happen. Now, I don't want to necessarily—

Mr. DESANTIS. Well, one witness said he said that, but he denied saying that, correct?

Mr. FINE. He denied saying that, and other witnesses said that he asked to find out who did it and asked them to go find out who did it and that they actually did, and they told him let it go, as a commander you're going to get complaints, just let it go, but he didn't.

And we talked about the CDI, you know, as Representative Zinke talked about. Well, the CDI was initiated after he had taken actions against the complainant. And if you read the CDI, it does not fully support those actions.

And so we—you know, it is a hard thing, and there are professional disagreements. There is often disagreements within our own organization. That's why you need to review it and carefully assess the evidence and reach appropriate conclusions and then to lay it out for people. Lay it out for people so that they can make their own determinations. I think that's the most important thing.

You may disagree, others may agree. I think it's important that we fully and fairly investigate it, and I think we did in this case.

Mr. DESANTIS. What about the—using whistleblower complaints in order to resist changes in a military command? I think this is a different issue than we would face in virtually all the other whistleblower complaints and other agencies, and I realize there's a different standard for military complaints. But here, you had an initial complaint against Admiral Losey that was just factually false.

Mr. FINE. Right.

Mr. DESANTIS. He paid out of his own pocket for his daughter. But even if he didn't, he still would have been following the law. And then I would say the complaint about there being a toxic climate is negated by the review that had been done by SOCAFRICA—or by AFRICOM about what they were doing to change the culture.

So what—is there a penalty if somebody is using that in an inappropriate way? And I just—I know with the numbers—and I think you made a good point about that, but clearly there are a significant number of complaints that are made that are just not substantiated. And while we want to root out waste, fraud, and abuse, I don't want to burden a military commander of having to fend off some of this stuff if there's no underlying basis to it.

Mr. FINE. Right. And they ought to then let the investigators do their job without conducting their own investigation, without trying to find out information—

Mr. DESANTIS. I understand that. But what—is there any problem with somebody using this inappropriately to blow a whistle when there's really no foul created?

Mr. FINE. If one can show that they did so without good faith and knowing that it was intentionally false, yes, action can be taken. That's a hard standard.

Mr. DESANTIS. What action would be—that would be an administrative action?

Mr. FINE. That would be an administrative action, yeah.

Mr. DESANTIS. Okay. My—

Mr. FINE. That's a hard standard to prove, I got to tell you that, and you do not want to, in my view, start chilling whistleblowers from bringing forward good faith allegations, even if they're not true. If they—you know, if they have a good-faith basis for it, they ought to be able to come forward, and we ought to investigate the underlying thing, and their ability to do that shouldn't be infringed upon.

Now, I understand that that's a difficulty, and we have it in our own organization, as was pointed out, and we seek to have full and fair investigations of it. You know, POGO was talking about the allegations against Mr. Shelley. Mr. Shelley adamantly disputes them, adamantly. Came to me, and instead of sweeping it under the rug, I decided, you know what, let's get an outside investigation, an independent investigation of this, and we'll take it wherever it leads, and we'll address it. And I think it's unfair to think that he's guilty before it's done, but it's also important to investigate it, and that's what we do, and it is difficult, but that's—that's what you have to do, and that's what we did in this case. And so we will wait the outcome of the investigation and take appropriate action, whatever it finds.

Mr. DESANTIS. My time is up.

The chair will now recognize the ranking member, Mr. Lynch, for 5 minutes. If he needs more, he can take more.

Mr. LYNCH. Okay. Thank you, Mr. Chairman.

The GAO report indicates that the rate of dismissal, though, at the DOD IG is far in excess of what it is for other services, 85 percent of the cases dismissed. So—and I'm reading from the GAO re-

port. They compared your—not yours, because you weren't there, you weren't in that position, but your predecessor.

The DOD IG closed 364 senior official cases, so we're comparing senior officials when they're charged versus, you know, rank and file. But in those cases where senior officers had been—or senior officials had been complained of, in your—in your investigations, you only investigated 27 out of 364 and then substantiated only 5, but you closed 364 cases.

In contrast, when we look at the other services and component IGs, they closed 250 senior official cases. They investigated all 250 of them and substantiated 90. So it just doesn't look right in terms of the mix there.

Mr. FINE. Can I, Congressman? Sorry.

Mr. LYNCH. We're going to give you plenty of time.

Mr. FINE. Sure.

Mr. LYNCH. I've got a couple of other things here I want to ask you as well.

The practice of backfilling, adding—you know, this the case management system, adding documents after the case has closed or in advance of the GAO POGO's investigation, sort of, you know, adding evidence to the case after the verdict has already been rendered. You know, when you took over, did you tell people you can't do this? Did you explain to people that—

Mr. FINE. Congressman Lynch, when I took over, I wanted to get to the bottom of this because I heard this allegation, and the reality is it was not backdating in the sense that you're talking about it. What it is, we were transitioning from a paper-based system to an electronic system, and we had to put that information in there, in the electronic system. There were also additional fields.

Mr. LYNCH. But here's the deal.

Mr. FINE. And we let—

Mr. LYNCH. Here's the deal.

Mr. FINE. —GAO know about it.

Mr. LYNCH. You dismissed this case, though.

Mr. FINE. Which case?

Mr. LYNCH. This case right here, figuratively.

Mr. FINE. Okay.

Mr. LYNCH. You dismissed this case. It was not warranted.

Mr. FINE. Right.

Mr. LYNCH. Okay. Then you got—you got evidence after—after the case was closed and you put the evidence in there.

Mr. FINE. No. We had evidence in there and then we put it into the database system, all of it. But we let GAO—

Mr. LYNCH. And you put it back—

Mr. FINE. We let GAO know it, and they were aware of it, and this is in accord with their data reliability thing.

Mr. LYNCH. Let's talk to GAO then. Let's ask POGO. Explain to me this—I read both reports, GAO and POGO report, and it appears to me that it alleges that there's backfilling of documents to files and they're being—also being mislabeled as investigative when they weren't investigative.

So let's take those two instances where there's backfilling, that's how it's described here, of new documents and files after they're

dismissed, and secondly, there are cases that are labeled investigative when they're really not.

Ms. SMITHBERGER. So for the first—first, I'll talk about the mislabeling the investigations, and that gets to the heart of our recommendation about standardizing the guidance for the military services. And we think that is—was part of the problem, because when the DOD IG went in to oversee, there was differences in how the services were doing this, and therefore it led to the 43 percent that I pointed out being mislabeled as full investigations when they were actually preliminary inquiries.

So we continue to believe that by the IG working with the Secretary of Defense to standardize the guidance so that would help—better help resolve that problem.

Mr. LYNCH. You think so, Mr. Fine?

Mr. FINE. Absolutely.

Mr. LYNCH. Okay.

Mr. FINE. That was the issue, that they had preliminary investigation that took forever, and our folks—

Mr. LYNCH. Right.

Mr. FINE. —had to figure out where to put that in.

Mr. LYNCH. Right.

Mr. FINE. It definitely would help if we had standardization.

Mr. LYNCH. So the statute says 180 days, and we're doing 526 or something like that?

Mr. FINE. Well, the statute says we have to—if we don't complete the investigation within 180 days, provide a notice to the complainant—

Mr. LYNCH. Right.

Mr. FINE. —and responsible management officials that we haven't completed it and the reasons why. It doesn't say you have to complete it within a—

Mr. LYNCH. Right, right. But you got to let somebody know, right?

Mr. FINE. Exactly, and we weren't doing that. We are doing that now.

Mr. LYNCH. Okay.

Mr. FINE. We have an automated alert. This is based on their recommendation.

Mr. LYNCH. All right. Let's go to—let's go to backfilling. And I appreciate that, Mr. Fine. I don't intend to—I only have limited time.

Mr. FINE. Sure.

Mr. LYNCH. so I don't mean to cut you off.

Mr. FINE. I understand.

Mr. LYNCH. But Ms. Smithberger or Ms. Atkinson, can we talk about backfilling, about documents going into the files?

Ms. ATKINSON. Yes, sir. Based—when we reported in our 2015 report was that DOD IG personnel uploaded key case documents after cases closed in 77 percent of the cases closed for fiscal year 2013. DOD IG staff made changes to case variables after cases were closed in 83 percent of the cases closed in fiscal year 2013. And this was based on our case file review that we did when we took a random sample of cases and had analysts go in and review and look for certain documentation and so forth.

Mr. LYNCH. Okay. Do you think they were trying to mislead Congress or mislead GAO?

Ms. ATKINSON. Sir, I can't speak to the intent or—

Mr. LYNCH. All right. Ms. Smithberger, can you speak to that?

Ms. SMITHBERGER. The whistleblowers that we have spoken to do feel like the intent was to miss the GAO.

Mr. LYNCH. Okay. All right. I'm short on time. Let me just—let me just say this in closing. I don't expect the Department of Defense to be run like a charm school. I understand the culture there, it's by rank, it's by command, there's a—you know, there's a healthy impetus to follow orders. But in cases like this where we may have people engaging in illegal or certainly misconduct on some level, you do want to have your personnel feel that they can report, that they can blow the whistle, and we want to protect that right because, as I said in my opening statement, there's a lot of concealment going on. It's very difficult to get information. So we rely—unfortunately, we have to rely heavily on whistleblowers to tell us when things are going wrong at some of these agencies.

With that, I yield back the balance of my time.

Mr. DESANTIS. The gentleman yields back.

The chair now recognizes the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

Mr. Fine, let me begin with you and just try to get some clarification.

According to the testimony that we've been given, the DOD IG automatically closes a case within 10 days. Is that not right?

Mr. FINE. That's not right. What the issue is, is if we are trying to get in touch with the complainant and the complainant drops off the screen and we can't get in touch with them, we tried several times again and again, finally, we'll send them a letter, a 10-day letter saying if you don't get back to us, we're going to close the case. We issued one 27 times in 4 years, 27 times in 4 years. And in those cases, 8 of them responded and we continued with the case, and the others never responded and we closed the case.

It is a prudent management tool if after a long period of time the complainants do not contact you, do not respond to your calls, it's important to close that case if they're not willing to go forward and—

Mr. HICE. So how long do they have before they get the 10-day letter?

Mr. FINE. They have at least several times where we contact them repeatedly and ask them to get in touch with us. And if they persistently do not get back to us, not in a short period of time but over an extended period of time, we'll eventually send a letter saying, look, if you don't get back to us—

Mr. HICE. So what kind of time do you give them before—in between letters? In other words, if someone is deployed—

Mr. FINE. Yes.

Mr. HICE. —if someone's engaged or something, what—

Mr. FINE. We absolutely are aware of that and give them time and give them—you know, I can't give you an exact figure, but our investigators know to give them significant time. And it's only when they repeatedly won't get back to us.

Mr. HICE. So you don't have a policy as to how—so who determines how frequently you try to reach out to them?

Mr. FINE. We're constantly reaching out to them, because without them, we can't go forward.

Mr. HICE. All right. You're constantly, what does that mean? I'm trying to wrap my mind around this. My understanding was 10 days. You're saying 10 days is the final—

Mr. FINE. The final—

Mr. HICE. —after multiple previous attempts.

Mr. FINE. Exactly.

Mr. HICE. So what's the timeframe in which these attempts are made?

Mr. FINE. You know, I can't give you a specific number. I don't have a metric, but I believe it's months.

Mr. HICE. Okay.

Mr. FINE. And if somebody then says, You know, I was deployed, we will reopen that case. You know, that's not an issue.

Mr. HICE. Ms. Atkinson, do you believe there's room for improvement on this, just what appears to me a rather nebulous policy?

Ms. ATKINSON. We do not specifically look at that, but I will tell you that when our—in our ongoing work looking at civilians and contractors, we are going to be looking at dismissals and substantiation rates, and so we may have more insight into that.

Mr. HICE. Okay. Let's go back, Mr. Fine, to you again, came up a moment ago about standardization. Where are we in that process?

Mr. FINE. Well, we are working with the service IGs to try and implement standardized processes. They all—not all but some of them do it different ways, preliminary investigations, how they do things. We believe it's appropriate to have a standardized process that will allow us to do things in a timely way and in a standardized way.

Having said that, the recommendation from GAO was to have the Secretary of Defense issue a directive to ensure that that happens, and in some sense, that's the only way it will happen, and we are willing to work with the Secretary of Defense to try and pursue standardization. That will take time, as you know, probably know. Getting a directive in the Department of Defense is not a easy thing. But in the interim, we are trying to voluntarily get them to standardize processes, and we have a working group set up where we meet with them and try and implement that.

Mr. HICE. Do you think it'll happen?

Mr. FINE. I hope so. I think so.

Mr. HICE. Ms. Atkinson?

Ms. ATKINSON. We certainly hope so. We think that's a key recommendation. And they have been working with a working group and they did change the guide, but the guide again is best practices, and we do believe it should be directed.

Mr. HICE. Do you believe we can make that happen?

Ms. ATKINSON. I hope that they can.

Mr. HICE. Okay. All right. So you have multiple attempts to reach out to these servicemembers. Right now, the reprisal investigation is—it was 526 days. Now it's been shortened.

Mr. FINE. Right.

Mr. HICE. But technically, the statute says 180 days?

Mr. FINE. Well, the statute says if you don't complete it in 180 days, you have to notify them that it's not completed and about the delay, so it doesn't require you to complete it within 180 days. Having said that, we do agree it should be shortened. We are seeking to shorten it.

In fiscal year, I think, 2014, it was over 500 days. In fiscal year 2015, it was 300 days for our investigations. That's still too long. We're trying to shorten it.

Mr. HICE. So there's no consequences except to the serviceperson for this going far beyond 180 days. And you can continue to prolong it. So long as you keep notifying, there's no dead end to this thing.

Mr. FINE. Well, we don't—yes. We intend to do this as quickly as possible. The consequences are we're held accountable in these kinds of hearings. And I would say this too. I wrote it in my written statement. You know, there is a burgeoning case load in whistleblowers. It is dramatically increased. We have not dramatically increased our resources. We are doing more with less.

I believe, as an IG, we ought to be commensurate with the Department of Defense. If they grow, we ought to grow. If they're stable, we ought to be stable. If they're constricted, we ought to constrict.

If you look at the last 20 years, the Department of Defense has grown dramatically. We haven't. If we had—if we had simply kept pace with them, we would have 500 more employees. We would be able to do these with more resources, rather than giving our investigators lots and lots of cases to work on, and I think that would inure to everybody's benefit, everybody's benefit.

Mr. HICE. Mr. Chairman, my time has expired.

And I appreciate that, but it seems to me that the servicemen and -women are suffering the longer this goes on. They are the only ones suffering. Everyone else gets a pass, but they are the ones that take a kick in the gut.

And I yield back.

Mr. DESANTIS. The gentleman yields back.

The chair now recognizes the gentlewoman from Michigan for 5 minutes.

Mrs. LAWRENCE. Thank you. The importance of whistleblowers cannot be overstated. Whistleblowers in the Department of Defense has the unique ability to expose fraud and waste in an agency that spends over \$500 billion of taxpayer dollars a year, and that accounts for almost a third of the programs on the GAO high risk list.

More importantly, DOD whistleblowers save lives. I want to be very clear about that. So this discussion we're having is very serious. Courageous whistleblowers like Mr. Coleman or Mr. Gayl, both Marines, come forward often at a great personal cost in order to protect others.

Ms. Atkinson, GAO has remarked that the DOD's culture does not encourage whistleblowing. Can you explain why?

Ms. ATKINSON. We reported in our 2015 report a statistic from the OPM's Federal Viewpoint Survey that talked about that, and that was the—where that information came from, and it was—there were two statistics, and one was for overall servicemembers,



and I think there was something like one in five servicemembers felt that they would be able to provide a complaint. And then the second one was a higher percentage, and that was toward—for members of the Office of the Inspector General. So that was not an initial—original GAO survey. That was in the information that we found in an OPM survey.

As far as the culture and so forth, you know, we think that continued oversight of the program is important, reporting to Congress on timeliness and corrective actions, monitoring their—the initial performance metrics that they've established for timeliness and completeness, and then, of course, importantly, reporting the corrective actions, because corrective actions can demonstrate the results of the investigations and offer hope to future whistleblowers and deter future incidents maybe.

Mrs. LAWRENCE. I have a short period of time. Mr. Fine, having worked in HR, you whistleblow when you're not heard. You whistleblow when there is a culture that when something is wrong, you're just supposed to do it and not have input.

Mr. Fine, just briefly, because I'm limited, tell me why whistleblowing has become a protected and defined activity or a culture that we are now having this hearing. Can you address that? What is the culture that we now have to develop processes to protect whistleblowers versus a culture that embraces the ability to empower people to have input on their jobs?

Mr. FINE. Well, I think the idea would be to have people have input in their jobs and feels if they can go to their management, their management would take appropriate action. And that is what managers and leaders strive to do. Is it always possible? I don't think so. And I also think that some whistleblowers don't believe that their management will take appropriate action or believe it's appropriate to bring it to other people's attention.

Mrs. LAWRENCE. Is there any action to address that?

Mr. FINE. Well, we do have whistleblower ombudsmen who educate people about their rights and responsibilities, both the rights of whistleblowers to be protected, the responsibilities of managers not to reprise against them, where they can go to provide whistleblower disclosures, what the processes are. I think it is important to educate people about the overall environment for whistleblowers.

Mrs. LAWRENCE. Ms. Atkinson, which of your recommendations is tailored to get the high number of dismissals back in line with other service IGs?

Ms. ATKINSON. To get the high number of dismissals back in line? I think that like—

Mrs. LAWRENCE. Because you said it was higher than others. So what is the plan?

Ms. ATKINSON. That's actually POGO.

Ms. SMITHBERGER. If I may interrupt.

Mrs. LAWRENCE. Okay.

Ms. SMITHBERGER. Let me provide some clarification. So we're not necessarily sure what the right rate of dismissal should be, but we think that it would be good to do another review to make sure that DOD IG is consistently following its own policies and the law to appropriately dismiss cases when they should be dismissed and appropriately investigating cases when they should be investigated.

Mrs. LAWRENCE. Mr. Fine, will you commit to us today that you will improve the current problems? We have—we seem to be real good at outlining what the problems are with this whistleblower reprisal investigation. You did state that you feel that there is an issue with resources. With that being heard, what is your commitment?

Mr. FINE. Oh, yes. We are trying, and I can commit to you, we are seeking to improve the processes with all the measures that I described in my statement. I do think it is important, and we are continuously seeking to improve.

Mrs. LAWRENCE. Thank you. I yield back.

Mr. DESANTIS. The gentlewoman's time has expired.

Ms. Smithberger, what is the right percentage of people? I mean, I just—I don't—I don't understand—I mean, the military is a different culture. Who's to say that it should be the same as the others?

Ms. SMITHBERGER. It might not be. We just want to make sure that everyone is consistently following the same law. We get concerned when we see substantiation rates that are as low as 1 percent or less than 1 percent, because that seems to send the message that there aren't really any credible whistleblowers that have been reprisal against, and we see that those numbers are much lower than we've seen for OSC.

One of the great things that DOD IG does is that they do report what happens to all of these cases. We wish that all of the IGs would do so so that we could ask the same kinds of questions, and we really appreciate their transparency on this.

Mr. DESANTIS. All right.

The chair now recognizes Mr. Duncan for 5 minutes.

Mr. DUNCAN. Thank you very much, Mr. Chairman. I have in front of me an article from the New York Times, slightly over 3 months ago, and it says: Whistleblower Beware. And it starts off and it says: Should it be a crime to report a crime? Many top officials in Washington seem to think so, at least in the case of Edward Snowden.

And it goes on to say that Secretary Clinton said that Edward Snowden would have gotten all the protections of a whistleblower, but it says, Thomas Drake would disagree, so would John Crane. And this article tells how these cases were all intertwined.

It says—and the Federal judge handling the case against Drake blasted prosecutors for putting Mr. Drake through 4 years of hell, said Mr. Snowden followed the Drake case closely in the news media and drew the obvious conclusion, going through channels was worse than a dead end. And then it tells how Mr. Crane was tied into that because it says Mr. Crane argues that the Defense Department broke the law in Mr. Drake's case. And then he was—he was dismissed.

So I would like to ask all three of you or any of the three of you who would like to comment, if you have studied that situation, how those cases are all tied in together and what you have to say about these really accusations in the—in this New York Times story that it's a dangerous thing for a whistleblower to come forward.

Mr. Fine, we'll start with you.

Mr. FINE. I think that I don't want to comment on the Drake case or the Crane case. Some aspects of it are still open and I don't want to impair that in any way. I will say that it is important that whistleblowers believe and that they know that if they do come forward, that they will be protected from reprisal and that there will be a full and fair and timely investigation done of that. That's an important issue. That's what we're striving to do. That's why we're striving to improve our programs.

Mr. DUNCAN. All right. Any of the—do the—do the gentleladies here know, are you familiar with these cases that this New York Times article has written about?

Ms. ATKINSON. No, sir. We did not look at specific cases. We did more a case file analysis and made generalizable observations about the process and guidance and stuff. Related to this, I guess, would be that we did report in 2015 that the substantiation rate for both DOD and IG and the service investigations were both under 10 percent. And this is also related to, I think, the importance of our recommendation about the need to report corrective actions and how that can benefit whistleblowers.

Mr. DUNCAN. All right. Ms. Smithberger?

Ms. SMITHBERGER. The Drake case did send a message to a number of whistleblowers that if you go through the right channels, you're still likely to have your career ended as a consequence, and so—and people refer to that case frequently.

In particular, there are concerns about DOD IG's role in turning over Drake, to recommend him being prosecuted under the Espionage Act. So DOD IG has a very difficult role in both trying to enforce laws and work with whistleblowers, but we do think that that created a chilling effect.

Mr. DUNCAN. Mr. Fine, do you think, is there anything at all that you think the Department of Defense could or should be doing to make the—or to give encouragement to whistleblowers to come forward that they're not doing now?

Mr. FINE. I think along the lines of what we've been talking about, to the extent we can standardize processes, we can improve programs, we can provide adequate resources so that the cases will be done in a more timely fashion, not only talking about resources for us but for the service IGs. Service IGs do a significant number of these cases. And when they're not adequately resourced either, then the cases languish, and it's a difficult task and challenge for them.

I think reflecting the importance of whistleblowers and the need for everybody, both the complainants as well as the subjects whose careers are on hold while the case is going, it is important to do these in a timely way and it's important to adequately resource them. So I think that's a critical factor.

Mr. DUNCAN. All right. Mr. Chairman, I would like to submit this article from the New York Times called, "Whistleblower Beware," to be entered into the record at this point. And I yield back.

Mr. DESANTIS. Without objection, it shall be so ordered.

Mr. DESANTIS. The chair now recognizes the gentleman from Florida, Mr. Mica, for 5 minutes.

Mr. MICA. Thank you. Thank you, Mr. Chairman.

Mr. Fine, how many whistleblower reprisal investigations have there been, like maybe 2015, 2014, 2013, do you know, each year?

Mr. FINE. I don't know the exact numbers. We can certainly get you the statistics. There are hundreds of them, hundreds of them.

Mr. MICA. Every year?

Mr. FINE. Yes. If you count the ones done by DOD IG as well as the ones we refer to the service IG.

Mr. MICA. Is there one service that sort of stands out? Most of them are not—

Mr. FINE. They all have them.

Mr. MICA. —equal.

Mr. FINE. They all have them.

Mr. MICA. And then I saw the time of resolving these cases, and some of that's been discussed. They put in law that—I guess it is in law the 120—is that 120-day goal—

Mr. FINE. 180.

Mr. MICA. —or by rule?

Mr. FINE. It's a law. After 180 days, you have to notify the complainant, if it's going to be delayed beyond that, as well as the responsible management officials to provide notification.

Mr. MICA. Okay. So you have hundreds of cases. How many staff do you have hearing the cases?

Mr. FINE. Sir, we have increased the staff, if you look at the last several years. We have around 50 staff who do whistleblower reprisal cases.

Mr. MICA. So 50 staff and a couple of hundred cases a year. Is that—

Mr. FINE. Not a couple hundred for us, but 50 staff to do—well, to do the cases themselves and then the oversight of the service IG cases when they come in—when they finish their investigation and send it to us. And then the service IGs have staff as well.

Mr. MICA. One of the things I read about is the reprisal investigations, there's—for each of the services, there may be different procedures. There's varying procedures, and some have recommended standardization. Maybe you could tell us what is wrong with having these variations, and then do you make the case for standardization based on those?

Mr. FINE. There are a couple of reasons I would make the case for standardization. One, I think, within the Department of Defense, you'll have a single process, and it shouldn't vary whether you are in the—whether in the Navy, the Army, Air Force, or civilian.

Mr. MICA. Could that be done administratively through the Secretary?

Mr. FINE. Yes, the Secretary.

Mr. MICA. Okay. So the authority is there to do this, to do the standardization?

Mr. FINE. Yes. And the GAO recommended that we work with the—

Mr. MICA. And you recommended.

Maybe, Mr. Chairman, we could also send a letter after this hearing saying that the GAO has recommended and this hearing, the witnesses we had recommend, and we find there would be ben-

efit and then some fairness to everybody. It sounds like there's disparity in, again, these approaches.

Is there any—also, when you have a reprisal investigation, is there any penalty against the accuser if the reprisal—you know, the person going after them, they find it is a false or there's no merit to the claim?

Mr. FINE. Not if the allegation was made in good faith, if they had a good-faith belief in the allegation.

Mr. MICA. Have there been any cases where you've gone back after these people?

Mr. FINE. I don't know the answer to that in recent times whether we've gone after people, but we—I think it would, you know, have a pretty significant chilling effect if you started investigating the complainant.

Mr. MICA. Well, again, it's—you don't want a chilling effect, but you don't want to use that—Mr. Duncan just read a case, and I read this, is it L-O-S-E-Y, the Brian Losey—

Mr. DESANTIS. Losey.

Mr. MICA. —Losey, yeah, case, what he went through. And basically, they ruin people's career. And then he got ganged by Congress on top of it, helping to ruin his reputation by some people he was trying to do the right thing, as I understand, in his command.

But you want to encourage whistleblowers, but again, there has to be some equity in the process for those who come as false accusers. I'm not sure how you craft that. Would you think that something like that would be beneficial?

Mr. FINE. I think the law, as it exists, is appropriate, that is, as long as someone makes a good-faith belief, a good faith—has a good-faith belief that the allegations they brought forward are accurate and true. We should not hold them accountable.

If we then determine, well, they weren't accurate or the subject did not reprise against them, because I think that would have an unbelievable chilling effect on other people.

Mr. MICA. Okay. And then we have Ms. Smithberger. And I saw in some of your testimony that your group pointed out that DOD's IG dismissal rate of 84.6 percent for whistleblower reprisal cases is more than double of that of inspectors general for the services for the same type of cases.

Can you elaborate on that? That does seem like a very high rate, and what—what else have you found—how—what would you attribute that to? Just—it does stand out. It's very—

Ms. SMITHBERGER. Yeah. And we think that there needs to be more evaluation as to why that's occurring, but our concern is that it creates the appearance that DOD IG has a higher—is more likely to dismiss a case than to investigate a case.

Mr. MICA. And did you—has your review found that to be the case or is—

Ms. SMITHBERGER. We have. So specifically—and all of this data comes from DOD IG's semiannual reports to Congress. We have found that service IGs dismissed during the past 4 years—or I'm sorry, they investigated 53 percent of the cases. DOD—that they received. DOD IG investigated 8.2 percent. The services substantiated 5.9 percent, and DOD IG substantiated 1 percent, and these are all military whistleblowers.

Mr. MICA. And now, I think we've got—Mr. Fine, looks a little bit anxious here to respond. So could we hear your response?

Mr. FINE. Thank you for that opportunity. This is our data, and I think that's not an accurate read of that data because within the data, that is counting as dismissal if we refer it to the service IG. That's not a dismissal. That is referring it. So the actual cases that we retain is a much different level. Having said that, I do think the data is important for the report and for—

Mr. MICA. You say that's not accurate.

Mr. FINE. We don't substantiate this.

Mr. MICA. Could you give us, to the committee for the record, staff—we ask questions after this, but that would be something I'd like to see in the record.

Mr. FINE. Absolutely.

Mr. MICA. And also for the record, I'd like to see the number of cases, again, maybe historically the last few years that I asked the question about earlier and then also the staffing rates. And finally, is there a budget constraint or something to pursue your work or are you adequately funded?

Mr. FINE. We're not adequately funded. Thank you for that question. We'd be happy to provide the information that you requested and we're glad to do so in response.

Mr. MICA. Finally, since my time is expired, you could put in the response the substantiation of the need for additional resources.

Mr. FINE. Okay. All right. Fine. I'll put that in as well.

Mr. MICA. Mr. Chairman, I'm pleased to yield back.

Mr. DESANTIS. The gentleman yields back.

I'd like to thank all of our witnesses for taking the time to appear before us today. There is no further business.

Without objection, the subcommittee stands adjourned.

[Whereupon, at 3:31 p.m., the subcommittee was adjourned.]

